Making Customary International Law Through Municipal Adjudication: A Structural Inquiry

M. O. CHIBUNDU*

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* Associate Professor, University of Maryland School of Law. The author gratefully acknowledges the helpful comments of Prof. Mortimer Sellers of the University of Baltimore School of Law, the research work of Mr. Christopher Edwards and Ms. Sandra Shin of the University of Maryland School of Law, Class of 2000, the editorial help of the staff of the Virginia Journal of International Law, and research funding by the University of Maryland School of Law, and its Dean, Donald Gifford.
I. Introduction

Among practitioners of the federal securities laws in the United States, a familiar didactic story recounts how Rule 10b-5\(^1\) — unquestionably the single most influential provision of those laws — became part of the canon.\(^2\) At an otherwise unmemorable meeting of the Securities and Exchange Commission ("SEC"), the question arose as to how the Commission should deal with the president of a publicly held corporation who was stating falsely that his company would do badly, thereby depressing the value of the stock of his company which he then purchased for his own benefit.\(^3\) Remarkably, almost a decade after the comprehensive enactment of laws intended to deal with manipulations in the public trading of securities,\(^4\) the SEC found itself hamstrung in dealing with this problem because there appeared to be no rule that directly addressed the situation. Invoking the broad rule-making power given to it under the enabling statute, the SEC "there and then" adopted the broad-sweeping "Rule 10b-5" with no debate. Indeed, any debate among the commissioners was forestalled by the all-too-obvious statement of one of the commissioners "after all, we are all against fraud, are we not?"\(^5\) From this innocent regulatory "acorn" sprung up a mighty oak of the litigation of fraud in the securities laws which the United States Supreme Court has spent the last twenty years trying to prune,\(^6\) and which, in a dramatic move, the U.S. Congress more recently

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2. The Federal Securities Laws refers to the legislative statutes, administrative rules and judicial opinions enacted since 1933 that regulate the creation, offer, sale, purchase, distribution and registration of transactions and interests in commercial enterprises that involve the use of the mails and other means of interstate communication in the United States. See generally LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION (3d ed. 1989).
5. Freeman, supra note 3.
matic move, the U.S. Congress more recently has sought to cut down even further. 7

The use of the domestic courts of the United States to enforce "international human rights" presents a not atypical analog to the above sketch in which, starting out with obvious benevolent objectives, at the end, one is left to wonder whether the means for realizing them through adjudication do not so alter their course as to turn those objectives on their head. This is the intellectual and practical puzzle presented by the flowering of resort to civil litigation in United States domestic courts to redress purported injuries suffered as the result of alleged violations of international human rights norms occurring in foreign jurisdictions by officials of foreign governments.

International law is currently in a transitional phase. The old norms of the sovereign equality of states, inviolable territorial independence, and national self-determination are being jettisoned not for their unintelligibility, impracticality and contradictions—all of which they suffer from—but as inconsistent with newer norms. The rights and obligations of individuals and subnational groups, the new norms assert, trump those of the state. The market, the rule of law, and democratic principles ought to take precedence over national economic development and military security in legitimating the exercise of state power, and the new norms should be made effective as much by the coercive use of "western power"—judicial and economic, when possible, military when necessary—as by reliance on hortatory admonitions and pleadings for voluntary compliance. International law, the emerging norms proclaim, ought to be more law and less politics; more protective of the individual than of the state; less relativistic and more universal. But the contours of these new norms are far from clear, and the process for their articulation, as much as their substance are (or should be) very much contested. A stable "new world order" is yet to emerge, and the interplay of norms and practicabilities that will provide the rhetorical legitimation for that new order is thus in flux.

This essay contributes to the ongoing discussions on the processes and substance of the new international legal order by exploring the use of adjudication in domestic courts to determine the content of international law. The essay subscribes to the utility of "transnational public litigation" as a tool of the international order. It recognizes that academic lawyers—including this writer—have a personal stake in hyping international human rights litigation. It relies on the disposition of claims purportedly arising under international human rights as the vehicle for the exploration because the adjudication of those claims epitomize the likely future of international law litigation. Unlike most of the American essays that have been written on the topic, however, its focus is less about shaping international law litigation to conform to the domestic or national interests of the United States, but in the


10. In addition to the United States cases discussed infra, Part II, the recent effort of Spain and France, among other European courts, to put the former Chilean head-of-state, Augusto Pinochet, on trial in Europe for acts that he allegedly perpetrated in Chile, a pending civil suit in France against the Cuban head-of-state, Fidel Castro, for conduct that exclusively took place in Cuba, are indicative of this emerging trend. On aspects of the Pinochet case, see infra text accompanying note 13. Regardless of the merits of these claims, they are intended first and foremost as Western expressions of the abhorrent acts being complained of. See Joan Fitzpatrick, The Future of the Alien Tort Claims Act of 1789: Lessons from In re Marcos Human Rights Litigation, 67 ST. JOHN'S L. REV. 491, 500-01 (1993) ("[A]lthough transnational public law plaintiffs routinely request retrospective damages or even prospective injunctive relief, their broader strategic goals are often served by a declaratory or default judgment announcing that a transnational norm has been violated. Even a judgment that the plaintiff cannot enforce against the defendant in the rendering forum empowers the plaintiff by creating a bargaining chip for use in other political fora").

11. As Professor Burley candidly states in a highly sophisticated treatment of the arguments for the power of U.S. courts to adjudicate claims of human rights violations occurring outside of the United States under the Alien Tort Claims Act:
consequences for international law of using domestic institutions to generate and contour it.

The essay takes seriously the "universalist" rhetoric of international human rights, and explores the implications of the use of the domestic courts of one country to enforce such rights. While the domestic legal competence of the enforcing court is doubtless critical to the inquiry, this essay contends that a claim for international legitimacy must be grounded on more than narrow domestic propriety, even where the interest is that of the world's most influential state. Neither textual nor historical exegesis of the jurisdictional competencies of a national court can satisfactorily explain why, as a matter of international law, the national courts of one country should exercise jurisdiction over acts occurring entirely outside of its territorial boundaries, and by persons not ordinarily subject to its prescriptions. The essay thus departs from the narrow nationalism-driven focus on the text and history of the Alien Tort Claims Act ("ATCA"), and analyzes that statute (and by implication, like statutes in other countries) on structural terms. Because human rights claims are no less susceptible to capture by self-interested groups and institutions, and because when transposed from their lofty ideals to practical implementation they serve multifaceted goals that are rarely, if ever, altruistic, the structural approach offers a richer insight for accepting or denigrating the claim for international legitimacy being made by proponents of Filartiga and its progeny.

The structural methodology is applied at two levels. First, there are the structural issues that are raised within the domestic framework of litigation. In the U.S., for example, these would include jurisdiction, standing, the class action device, and the burden of proof, to name a few. These are issues that typically are addressed

[D]uty ultimately reinforces interest. A fundamental premise of modern human rights law, based on the experience of the 1930s, is that internal repression breeds external insecurity .... Although expanding [ATCA] to cover cases against official torturers is indeed consistent with its letter and its spirit, such cases provide more symbol than substance in terms of actually advancing the cause of international human rights. Still, they will contribute in their own way to the moral and political standing of the United States as a champion of international law.


12. In recognition of the seminal American case that has adopted this position, Filartiga v. Pena-Irala, 630 F.2d 832 (2d Cir. 1980), I shall frequently refer to the doctrinal treatment of this issue in the United States as the Filartiga Proposition. See infra Part III.
by rules of practice and procedure. They take as given the legitimacy of the systemic framework, and merely inquire into the effectiveness of the system to deliver the promised "justice," "fairness" or "efficiency."

The second element of structural analysis is the extent to which adjudication in a domestic court effectively promotes the core value of accountability, which, as I shall argue, is central to the idea of the "rule of law." For the most part, U.S. commentators have been oblivious to the nonrepresentativeness of adjudication in U.S. domestic courts. It is customarily assumed that representativeness is warranted in the formulation of substantive norms, but not in their enforcement. Thus, while these commentators have argued over the universalism of the substantive norms underlying international human rights such as the meaning of torture, they have not bothered with the relevance and consequences of the representative character of the body enforcing those norms.

Since the efforts of the United States federal courts to deal with cases brought by foreigners against other foreigners for alleged violations of international human rights occurring entirely outside of the United States, and the commentaries that these efforts have generated represent the most highly developed body of literature on the subject, much of this article is informed by that literature. Moreover, to the extent that customary international law derives from the practices of member states of the international community, the practice of U.S. courts is noteworthy, not only because of the preponderant political, economic and military influence of the U.S., but also because the open discourse in which the jurists and academic commentators engage surely legitimizes any conclusions they reach to a greater extent than would be the case in a closed legal system. The weaknesses evinced by these efforts, one may assume, a fortiori, permeate the use of domestic courts in other societies to enforce customary international law and more particularly, international human rights law.

13. Thus the English courts confronted with whether international law obliged them to authorize proceedings in England for the extradition to Spain of the former Chilean head-of-state, Augusto Pinochet, for wrongful acts that he allegedly committed in Chile, frequently looked to U.S. decisions that have applied the Filartiga Proposition to former heads-of-state. See Ex parte Pinochet (H. L. 1998); In re Pinochet, (Q. B. 1998.)
14. See infra Part II.
15. Not to be discounted, of course, is the reality that I am a good deal more familiar with the U.S. legal system than with any other. I think, however, that to the extent customary international law embraces the Filartiga situation, it will be because of the practice of U.S. courts and supporting academic commentaries.
Part II of this essay is a summary introduction to the concept of customary international law. Part III presents and discusses the judicial and academic literature on the use of U.S. domestic courts to enforce international human rights norms. Part IV is an internal structural critique of the Filartiga Proposition introduced in note 12. The special contributions of the essay are found in Parts IV-VI, where I take seriously the rhetoric of an "international community" capable of being organized by "the rule of law." Accepting that within such a community, some must act as primus inter pares, this essay argues that, as in the most quintessential of communities—the family—power alone cannot (or perhaps should not) be the arbiter of the permissible and the impermissible. These parts therefore explore the use of domestic courts not simply as a statement of the distribution of power within the domestic setting (albeit a relevant inquiry, and one that is pursued in Part IV), but just as significantly, the propriety of such use of courts within a framework where domestic institutions are not otherwise accountable to the "international community," an issue that, unfortunately, has all too rarely received attention even from proponents of an international right to democratic rule. Part V thus examines the relationship between the idea of limited extraterritorial jurisdiction and representativeness within a community, and Part VI asks whether international human rights law should be an exception to the standard of limited extraterritoriality.

II. CUSTOMARY INTERNATIONAL LAW

Because much of this essay is critical of the emerging practice of using the domestic courts of the United States as a means of adjudicating purported violations of "customary international law norms" that occur entirely outside of the United States, and that have only the most tenuous of connections with life in the United States, it is worthwhile at the outset to acknowledge the limitations of a regime of customary international law that lacks such a domestic court enforcement mechanism. The challenge for the development of customary international law lies in creating and promoting a regime whose framework takes account of the limitations described in this part without falling prey to the even more substantial shortcomings of domestic court adjudication analyzed in the subsequent two parts.
Theories of customary international law are at best ambiguous. Lacking standardized practice, and subject to no policing mechanism, its sources, scope, boundaries and authoritativeness are all highly contested. The resulting amorphousness of the idea—and it is more an idea than an authoritative doctrine—has become particularly acute in the current transitional environment in which hitherto established doctrines of international relations, such as the primacy and sovereignty of the state, are under significant challenge.

Customary international law is probably best understood in the context of one of the more familiar of the several dichotomies of international law: that between “treaty” and “custom.” The boundaries of treaty law are reasonably well-defined. Treaties—and their acolytes including charters, conventions, protocols, “executive agreements,” “memoranda of understandings,” and the like—memorialize explicit undertakings of the parties, and regulate their conduct on the ground that the parties have explicitly assented to be so regulated. Treaties are law and are binding on the parties for the same reasons and within more or less the same interpretive conditions that contracts are said to bind. Treaties are thus enforceable only within their own terms, and legal rights, obligations, liabilities, immunities and sanctions attach to them in accordance with their interpretation.


17. Professor Rubin’s unromantic but accurate portrayal of the “international legal system” is particularly pertinent to the making of customary international law within that system:

The international legal order is essentially a common law system without a compulsory tribunal; without a priestly or ‘judgely’ caste. Attempts to envisage an invisible college of international jurists from this perspective seem to be part of the struggle for authority with the scholars of the law, or some of them, arguing that their own insights are somehow binding on statesmen....[T]he scholars’ debates...are usually polemical exercises in group thought or are amorphous and inconclusive.

Alfred P. Rubin, Ethics and Authority in International Law 28 (1997).

18. International law is replete with such binaries, which are rarely clear-cut. Others include those between “municipal/international,” “public/private,” and “hard/soft.” For a critique of the functional and indeed theoretical utility of these distinctions, see Trimble, supra note 9.

In its broadest sweep, customary international law is the grab-bag of principles, practices, procedures, standards and norms which one believes ought to regulate conduct with transnational effect, but the authority for which cannot be readily found in a self-executing or directly enforceable international agreement. The texture to this "soft law" is provided not so much by its content as by its source. Thus, it is said to be "the general principles of law recognized by civilized states," and to flow from "practice," "custom," "usage" and "opinion juris," including the decisions of international tribunals and national courts, as well as the expounded views of learned jurists and scholars writing "professedly" on the subject.\textsuperscript{20} Such law may be divined from the spirit of nonself-executing treaties,\textsuperscript{21} from the pronouncements of international organizations,\textsuperscript{22} or simply from a sense of the age or spirit of the times.\textsuperscript{23} All that seems needed to create the "law" are its

\textsuperscript{20} There is no authoritative definition of customary international law. The following is a widely used proxy:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

Statute of the International Court of Justice, art. 38.


\textsuperscript{22} The Resolutions and Declarations of the United Nations General Assembly have been frequent sources of this claim. \textit{See infra} note 33.

\textsuperscript{23} Thus, substantial arguments have been made that toleration of domestic bribery and corruption in developing countries ("spoliation"), "capital punishment," "environmental degradation" and the denial of the right to participate in national elections may constitute violations of customary international law. \textit{See}, e.g., NDIVA KOFELE-KALE, INTERNATIONAL LAW OF RESPONSIBILITY FOR ECONOMIC CRIMES: HOLDING HEADS OF STATE AND OTHER HIGH RANKING STATE OFFICIALS INDIVIDUALLY LIABLE FOR ACTS OF FRAUDULENT ENRICHMENT 112 (1995); Thomas M. Franck, \textit{The Democratic
imagining and articulation by a scholar or jurist of some reputation. Its acceptance may be narrow or broad, its pedigree may be questioned, and it may subsequently come to be disavowed, but it is virtually impossible to definitively assert that it is not "law."

Customary international law *qua* law thus potentially suffers from three disabling ailments. First, it lacks an authoritative text to which reference can be made for the purpose of determining with some certainty that which is prohibited from that which is permissible. It thus appears to flout a broadly accepted virtue of law as a source of predictable behavior.

Second, the variousness of competent law-givers and the lack of any vertical hierarchy among them go against the generally shared understanding of law as expressive not simply of norms and mores, but as a source of authoritative power. Where interpreters differ, the conventional teaching of law insists that there be a final source capable of resolving differences by appeal to reason (including such considerations as history, logic, tradition, experience and the like), if possible, but by fiat when necessary. The diffusion of authorities who may legitimately pronounce what constitutes international law, and the lack of any ultimate arbiter of the varied interpretations within the international community *qua* community, leaves open the possibility of the simultaneous existence of irreconcilable constructions of an identical legal doctrine within the same community.\(^{24}\)

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\(^{24}\) It might be argued that this is not a unique phenomenon. In a federal society with a common law approach to law-making such as the United States, there are instances where an identical legal doctrine can have different interpretations with no ultimate arbiter to harmonize them. Thus, for example, the extent to which a defendant's negligence can be fully or partially excused by the plaintiff's contributory negligence varies from one of the domestic jurisdictions of the United States to another, with the United States Supreme Court lacking any authority to harmonize conflicting decisions in the various states. Yet, this seeming resemblance to customary international law is at best superficial. The negligence law at stake is the law of the individual state, not the law of the United States; and in any event, generations of shared common legal culture as well as explicit positive enactments such as the constitutional requirement of giving "full faith and credit" to the judgments of sister states (U.S. Const. art. IV, § 1), and implementing legislation (28 U.S.C. § 1738 (1989)), tend to generate internal consistency and uniformity in the authoritative interpretation of such laws. Presumably, "customary international law" is the law of the international community, not simply that of each nation state. This is so even when one accepts as part of the law the concept of the "persistent objector status" which seems to nullify the otherwise presumptive application of customary international law to a state that has persistently objected to a principle of international law. See, e.g., Theodore Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 Harv. Int'l L.J. 457 (1985); David A. Colson, *How Persistent Must the
Finally, there is the issue of "compliance" or (failing that) "enforcement." This is an aspect not only of customary international law, but of international law generally, which has received a good deal of attention. Indeed, many social scientists have contended that the absence of any swift and sure way of enforcing international law means that it is not "law"; after all, "law" is the "command of the sovereign," and behind that command lies the sovereign's dungeon.

The use of domestic courts to articulate and enforce customary international law might seem to provide ready alleviation for these shortcomings. Domestic courts are in the business of providing authoritative construction to rules of conduct, whether they originate from official enactments—legislative, executive or administrative—or from privately ordered customs, usages or social mores. Moreover, in every society, there is a final arbiter of what constitutes law, so that even if there is not complete uniformity across the globe, customary international law when construed and applied by domestic courts will likely receive authoritative and binding interpretation within national societies. And, of course, national courts come equipped with true and tried enforcement mechanisms. This is an especially pertinent consideration where, as in much of customary international law, while substantive rights are generously adumbrated, less attention is generally given to the remedies available for their violation.

The essence of what follows is that even if one accepts the salience of these arguments, the cost of employing domestic courts to give effect to customary international law—at least in the Filaritiga-type context discussed below—may not be worth the candle. The point of the argument is not to reject the use of domestic courts out-of-hand, but to indicate that if they are to usefully and legitimately fill the lacunae in the making and enforcement of customary international law, those who have thus far unquestioningly resorted to them to create their image of what the international society ought to be need to engage in a more searching inquiry of

Persistent Objector Be?, 61 WASH. L. REV. 957 (1986); Louis B. Sohn, "Generally Accepted" International Rules, 61 WASH. L. REV. 1073 (1986).

25. But see supra note 24 (discussing the peculiar status of this doctrine within the U.S. federal judicial structure).

26. Cf. infra notes 55-56 and accompanying text (discussing the effort of U.S. domestic courts to articulate available remedies for violation of "the law of nations" under the Alien Tort Claims Act).
the role of law in shaping and creating respect for the rule of law within a genuinely international community.27

III. THE FILARTIGA PROPOSITION

That the domestic courts of one country—the United States—are competent to decide the liability of a foreign government official for wrongs inflicted on a citizen of the foreign state within the territory of that foreign state was the seminal holding of Filartiga.28 The decision has been read to stand for a breathtakingly simple proposition: that a foreigner, merely by alleging a violation of the law of nations, is entitled to sue in the courts of the United States.29

27. For an extended defense of this position, see infra Part VI.
28. Filartiga, 630 F.2d at 876. Prior to Filartiga, two district courts had relied on section 1350 to adjudicate claims of alleged violation of international law by one alien against another alien. See Adra v. Clift, 195 F.Supp. 857 (D. Md. 1961) (involving a child custody dispute in which alleged wrongful withholding of custody and falsification of child's passport for the purpose of procuring custody implicated violation of the law of nations); Banchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (providing by section 1350 an alternative basis for jurisdiction in a suit for restitution of three slaves who were on board a Spanish ship seized as a prize of war; U.S. treaty with France was found to supersede law of nations). Neither one of these cases involved a claim by an alien that the conduct of a foreign official within the territory of that official subjected the official to suit in a United States court.
29. See Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995). Although most claims brought under the Filartiga Proposition have alleged violations of the “human rights” of individual litigants, the proposition as the courts have articulated it cannot be readily limited to these instances of arguably egregious conduct. Indeed, proponents of environmental rights have increasingly invoked the proposition to challenge alleged environmental damage occurring outside of the United States, as well as claimed collusions between private corporations and third world governments in thereby denying their nationals “environmental and political justice.” See, e.g., Amlon Metals, Inc. v. FMC Corp., 775 F.Supp. 168 (S.D.N.Y. 1991); Beanal v. Freeport-McMoRan, Inc., 969 F.Supp. 362 (E.D.La. 1997); National Coalition Gov’t of Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D.Cal. 1997); Wiwa v. Royal Dutch Petroleum Co., 96 8389 (S.D.N.Y. 1996). Further, notwithstanding the purported limitation of potential claims to those sounding in “tort,” virtually any claim for economic loss can be transposed into a “tort . . . in violation of the law of nations.” See Hilao v. Marcos, 101 F.3d 767 (9th Cir. 1996) (seizure of privately owned radio broadcasting); Siderman de Blake v. Argentina, 965 F.2d 699 (9th Cir. 1992) (seizure of business enterprise); Bigo v. Coca-Cola Co., 1998 WL 293990 (S.D.N.Y. 1998) (leasing of expropriated property). The reality is that, as any averagely intelligent second-year American law school student can demonstrate, the combination of the “notice” pleading standards of the FEDERAL RULES OF CIVIL PROCEDURE and the amorphous substantive tort concepts of “conversion” and “failure to warn” cases provide ample grounds for using the Filartiga standard as an in terrorem instrument not only in furtherance of civil rights norms, but also for less generally sanctioned objectives. Cf. Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (rejecting the effort to convert an alleged state-sanctioned imprisonment of the plaintiff into a tort claim of failure to warn). Thus, at stake in the discussion of the scope of Filartiga Proposition is not simply whether United
Like the proverbial road, the proposition was the product of the best of motivations. In *Filartiga*, the United States Court of Appeals for the Second Circuit, reviewing the dismissal by a United States District Court in New York of a claim by a Paraguayan citizen against a former Paraguayan government official for the “wrongful death” of a Paraguayan national caused by the alleged use of torture in Paraguay, concluded that a provision of United States law authorizing suits by “an alien” to obtain redress for a “tort only in violation of the law of nations” gave the trial court the power to hear the case. In the court’s view, “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties,” and a U.S. federal court has jurisdiction to hear a claim predicated on such an allegation “whenever an alleged torturer is found and served with process by an alien within our borders.”

In arriving at this proposition, the court began with the only mildly controversial assertion that the universal condemnation of torture in international agreements and its renunciation as an in-
instrument of official policy by virtually all of the nations of the world "in principle if not in practice," mean that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights. More questionably, it equated such violation of "norms" with the violation of the "law of nations" redressable by a civil suit under the ATCA. Even more controversially, having made this equation, the court held it up as a blanket rule seemingly applicable in all circumstances and without regard to generally acknowledged limitations such as that "international law" or "the law of nations" regulates—or at least penalizes—only conduct at the interstate level, or that there are internationally recognized limitations on


Hilao v. Marcos, 101 F.3d 767, 789, 194 (9th Cir. 1996) (quotation marks and case citation omitted).

35. *See Filartiga*, 630 F.2d at 880.

36. *Id.* But see Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 810-11 (D.C. Cir. 1984) (Bork, J., concurring) (pointing out that there is in United States jurisprudence a well understood distinction between giving a court the authority to hear a class of cases (existence of jurisdiction) and determining that a plaintiff is entitled to bring that class of cases before the court (existence of a right of action)). *Cf.* United States v. Mitchell, 463 U.S. 206, 216-17 (1983) (holding that the Tucker Act which permits suits against the United States in certain cases (notwithstanding the doctrine of "sovereign immunity") is jurisdictional, and does not thereby create a substantive right of action). *See also infra* notes 75-77 and accompanying text. But see Tafflin v. Levitt, 493 U.S. 455, 460 (1990) (seemingly equating the creation of a private right of action with the grant of jurisdiction).

37. This is subject, of course, to the finding that the act does violate a norm of international law, which the Court decreed requires that the alleged wrong be "of mutual, and not merely several, concern." *Filartiga*, 630 F.2d at 888.

38. *See, e.g.,* Dreyfus v. Von Finck, 534 F.2d 24, 30-31 (2d Cir. 1976) (commenting that "[T]here has been little judicial interpretation of what constitutes the law of nations and no universally accepted definition of this phrase. There is a general consensus, however, that it deals primarily with the relationship among nations rather than among individuals. It is termed the Law of Nations or International Law because it is relative to States or Po-
the extraterritorial reach of the judicial powers of the domestic courts of a state. The only limiting structural principle recognized by the *Filartiga* court was that embodied in the U.S. Constitu
tional distribution of power, and this the court easily (and cor
crectly) disposed of as not constraining the exercise of judicial power in the circumstances of the *Filartiga* case.

As the *Filartiga* court repeatedly pointed out, it was engaged less in a legal than a moral crusade. The case, we are told at the very outset, is about whether the United States in its relations with other nations "is bound both to observe and construe the accepted norms of international law." The answer, we are further informed at the end, must be responsive to the admittedly elusive aspirations that animated the founding of the United Nations on the ashes of the last great war; and hence "[o]ur holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." In the process, a pertinent legal principle by the same court stated only four years earlier was dismissed as "clearly out of tune with the current usage and practice of international law," and the specifics of the new

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39. See infra note 178 and accompanying text.

40. See *Filartiga*, 630 F.2d at 885-86. As I argue in Part VI, infra, the most troubling issues arising out of domestic court adjudication of cases like *Filartiga* are not resolved by deliberating on the internal distribution of power within a state—whether that distribution purports to address federalism or separation of powers concerns. The accountability problems which such adjudication confronts go to our construction of the legal order for the "international community," not that of the United States or any other sovereign state within that community.

41. *Filartiga*, 630 F.2d at 877.

42. Id. at 890.

43. Id. at 884 (rejecting the position in *Dreyfus*, 534 F.2d at 31, that "violations of international law do not occur when the aggrieved parties are nationals of the acting state"). It is noteworthy that the four years that separate these decisions parallel those of the Jimmy Carter administration, whose fundamental contribution to U.S. foreign policy was (in this author's view) the highly admirable emphasis on the relevance of human rights norms to interstate relations; a policy often viewed as a departure from the realpolitik of prior U.S. governments, especially those whose foreign policies were strongly influenced by Dr. Henry Kissinger.
doctrine, including whether the substantive law to be applied is itself international or municipal, need not be fleshed out.\(^ {44}\)

It is thus hardly surprising that in *Amerada Hess Shipping Corporation v. Argentine Republic*,\(^ {45}\) the same court held that a Bahamian shipping corporation operating a Liberian chartered ship could bring an action under the ATCA in a U.S. court against Argentina to recover for damages to the ship caused by the bombing of the ship in international waters during the Falklands/Malvinas war between Argentina and the United Kingdom. For the court, the decisive point was that Argentina's bombing of the ships was "in violation of international law." Neither Argentina's posture as a sovereign, nor the tenuous connection of the plaintiffs to the United States was deemed relevant to the judicial power of the courts of the United States to adjudicate the claim so long as the allegations could be read fairly to state a violation of international law.\(^ {46}\)

More recently, in a clearly politically motivated lawsuit in which a group of U.S.-based activists\(^ {47}\) sought to hold the Bosnian-Serb leader, Radovan Karadzic, accountable for some of the atrocities of the Bosnian civil war,\(^ {48}\) the Second Circuit held that a U.S. fed-

\(^{44}\) See *Filartiga*, 630 F.2d at 888. Cf. Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) (stating that the substantive law to be applied under the ATCA is international). See also Xuntag v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (finding that both international and municipal law may be applied).


\(^{46}\) See *Amerada Hess*, 830 F.2d at 425 (stating that "the Alien Tort Statute means what it says. If an alien brings a suit, for a tort only, that sufficiently alleges a violation of the law of nations, then the district court has jurisdiction"); *id.* at 425-26 (rejecting Argentina's claim that the ATCA applies only to individual acts, and holding that "[t]he modern view, however, is that sovereigns are not immune from suit for their violations of international law."). *But see Amerada Hess*, 488 U.S. 428 (holding that foreign sovereigns may be sued in U.S. courts only if such suits are expressly permitted under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611).

\(^{47}\) Among these were The Center for Constitutional Rights, the International Women Human Rights Clinic, The International League of Human Rights, the International Human Rights Clinic, and the National Organization of Women Legal Defense and Education Fund. See Kadic v. Karadzic, 70 F.3d 232, 235-36 (2d Cir. 1995), reh'g denied, 74 F.3d 377 (2d Cir. 1996). In addition, *amicus curiae* briefs were filed by a group of law professors, Human Rights Watch, the International Human Rights Law Group, and various women's refugee and immigration representation centers. *Id.*

\(^{48}\) There is, of course, no denying the brutishness with which the Bosnian civil war was fought, nor the responsibility of Bosnian Serbs for rape, torture and summary executions in the conduct of the war. Moreover, for the purpose of ascertaining the existence of subject matter jurisdiction, the Court was well within accepted legal standards to take as true these allegations and those of "forced prostitution...[and] forced impregnation ... by
eral district court was authorized by the ATCA to adjudicate Mr. Karadzic’s liability to unenumerated Croat and Moslem class members on whose behalf claims of international law violations grounded on “genocide, war crimes, and crimes against humanity” were asserted. While pointing out that “[m]ost Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan,” the Court none-theless permitted this remarkable extraterritorial reach of U.S. judicial power on the basis of the Filartiga Proposition. The Court held that neither the assertion that Mr. Karadzic was a non-state actor nor that he did not personally perpetrate the alleged brutalities insulated him from liability. Similarly, the use of the class action device to represent unknown and perhaps unknowable victims of the alleged mass torts did not operate to constrain the scope of the ATCA. As with Filartiga and Amerada Hess, the Second Circuit reduced these politically infused claims to the rhetorical question of whether the plaintiffs’ allegations, taken as true, can be said to violate international law. Given the self-evident answer, a Federal District Court in New York had jurisdiction to determine whether a Bosnian-Serb leader should be held liable to

Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war.” Kadic, 70 F.3d at 236-37.

49. As the Court succinctly put it, the Filartiga decision stands for the principle “that the venerable Alien Tort Act, enacted in 1789 but rarely invoked since then, validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations.” Id. at 236 (citation omitted).

50. Cf. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791-92 (Edwards, J., concurring) (finding that the Palestinian Liberation Organization could not be held liable for alleged extraterritorial torts in violation of the law of nations because the ATCA applies only to torts committed by state actors acting in their official capacities). The trial court had declined to assert jurisdiction largely on this ground. See Doe I v. Karadzic, 866 F. Supp. 734, 738-41 (S.D.N.Y. 1994). See also infra note 65 and accompanying text (discussing Judge Edwards’ concurrence in Tel-Oren).

51. See Kadic, 70 F.3d at 242 (invoking the Nuremberg principle of command responsibility).

52. Given the Court’s ideology, class actions, it might be said, should be favored. Cf. infra note 119.

53. The Court did of course consider the commensurability of its adjudication with that of U.S. foreign policy decision-making under the aegis of “the political question doctrine.” See Kadic, 70 F.3d at 248-49. But “political considerations” are apparently relevant only to the that extent, and apparently do not extend to the interests of the Balkan peoples or even international feminists whose interests were surely directly implicated by the adjudication.
as yet unidentified Bosnian Croats and Moslems who were victimized in a civil war in Bosnia.\textsuperscript{54}

This reading of the ATCA as knightng American courts to slay the dragon of international lawness without regard to structural limits on the exercise of judicial power has been adopted with no greater scrutiny but with broader scope by two other appellate courts. The Ninth Circuit, ruling on a series of cases growing out of numerous litigations arising out of the defalcations of the Marcos family in the Philippines, held that U.S. courts under the ATCA could assert jurisdiction over a former head-of-state and his officials to adjudicate class actions brought against them for alleged violations of international law.\textsuperscript{55} Moreover, the Court held that plaintiffs in such cases need not rely on international law to provide the substantive grounding for their claims, but may instead invoke various municipal laws, including those of the United States as well as of the Philippines. Further, available remedies appear not to be constrained by the law that provides the substantive right, but may be fashioned by the trial court through a mish-mash of laws as the trial judge sees fit. The consequence, under the Ninth Circuit’s jurisprudence, is that “international law” apparently goes so far that a plaintiff may successfully invoke the ATCA and subject a foreign official to suit in a U.S. court over internal political differences and the distribution of property rights such as those entailed by the closing down of a local radio station by a megalomaniacal dictator.\textsuperscript{56}

\textsuperscript{54} The Court left open the possibility that a trial court might, in its discretion, decline the exercise of jurisdiction by applying such prudent doctrines as the act of state and forum non conveniens. See Kadic, 70 F.3d at 250. Even if this suggestion is not merely chimeric (see id. (“we think it would be a rare case in which the act of state doctrine precluded suit under section 1350,” and “[n]o party has identified a more suitable forum, and we are aware of none”)), such discretionary decision-making does not address the fundamental issues of accountability that should be at the core of the interpretation of the ATCA, in particular, and the use of the domestic courts of one country to enforce customary international law generally. These issues are discussed in Part VI, infra.


\textsuperscript{56} See Hilao, 103 F.3d at 794 (finding as reversible error the trial’s court refusal to submit to the jury a claim for “destruction” of a radio station flowing from it being closed down by the Marcos government).
Somewhat less striking is the Eleventh Circuit's holding in Abebe-Jira v. Negewo. In affirming a trial court's award of compensatory and punitive damages to three Ethiopians who sued a former official of the Mengistu government, the court adopted the Filartiga Proposition, and uncritically included as an international law violation not only "torture," but "cruel, inhuman, and degrading treatment" as well.

The Filartiga Proposition, then, as articulated by U.S. appellate courts, simply and straightforwardly asserts that U.S. trial courts are required to entertain lawsuits by foreign plaintiffs where an element of the claim arguably constitutes a violation of interna-

57. 72 F.3d 844 (11th Cir. 1996). The Second Circuit in Kadic, 70 F.3d at 250, captures this dismissiveness: "appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state."

Again, it is worth repeating that the U.S. courts, while they may be at the forefront of the developing jurisprudence, are by no means unique. The extent to which the United Kingdom's ratification of the Convention on the Prohibition of Torture thereby authorized its courts to ignore the claim of immunity by a former head-of-state for acts done entirely outside of the United Kingdom was at the core of a 3-2 divide in the English House of Lords' original decision Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet (House of Lords, Nov. 25, 1998). A key divide among the Law Lords centered around the impact on English jurisdictional rules of the international prohibition on torture. Unlike American courts, however, some of the English Law Lords were at least willing to consider the relevance of Chilean domestic judicial proceedings and politics on the assertion of jurisdiction by an English over a Chilean for events that occurred entirely in Chile. See id., Opinion of Lord Lloyd of Burwick. But see Ex parte Pinochet Ugarte (No. 2), 2 All E.R. 97 (1999) (Op. of Lord Browne-Wilkinson) ("Although others perceive our task as being to choose between the two sides on the grounds of personal preference or political inclination, that is an entire misconception. Our job is to decide two questions of law: are there any extradition crimes and, if so, is Senator Pinochet immune from trial for committing those crimes").

58. Abebe-Jira, 72 F.3d at 845. This is an issue of some disagreement among federal courts. One district court, after exhaustive exploration of the matter on two separate occasions, has expressly declined to hold that the assertion of "cruel, inhuman, and degrading treatment" constitutes a violation of international law cognizable under the ATCA. See Forti v. Suarez-Mason, 672 F. Supp. 1531, 1543 (N.D. Cal. 1987), reaf'd on reh'g, 694 F. Supp. 707, 712 (N.D. Cal. 1988). On the other hand, the trial court in Xuncax v. Gramajo, 886 F. Supp. 162, 186-87 (D. Mass. 1995) held that where the basis for the claim of "cruel, inhuman and degrading treatment" is that plaintiffs were forced to witness the torture or mistreatment of an immediate relative, the ransacking of their home, the threatening of family, or were subjected to bombing from the air or had grenades thrown at them, it would be cognizable as a violation of international law within the reach of the ATCA. But such a claim grounded on the assertion that plaintiffs "were placed in great fear for their lives ... and were forced to leave their homes and country and flee into exile" is not cognizable as a violation of international law. Cf. Hila, 101 F.3d at 785 (9th Cir. 1996) (court need not decide "whether the proscription against 'cruel, inhuman, or degrading treatment is sufficiently specific to allow a suit for its violation under 1350 or what, apart from torture and arbitrary detention, which are recognized as actionable violations of international law, it might consist of").
tional law. The resulting application of the power of the United States is thus shaped by the determination of a trial court judge as to whether the alleged wrongful acts meet the court's conception of a "tort" violative of "international law." This application of power raises issues not simply of domestic statutory and constitutional interpretation, nor merely those of ascertaining the content of international human rights law. Fundamentally, those of the regulation by the judicial branch in one country of governance issues in the foreign country was either overlooked by these courts, or the necessary consideration received the dismissive treatment that no more need be said because the alleged conduct violates international law. Such pat statements, however, only barely mask the issues of power and chauvinism they entail. The obfuscation of these concerns by pulling on the heartstrings of universal humanity can at most be temporary, for at heart, it undercuts the normative justification of the "rule of law," which is one of the frequently invoked pillars of the new order in international relations.

It is, of course, not that United States courts are either unaware or incapable of appreciating and being guided by concerns of power and sovereignty in these matters. Rather, it is the reach of those concerns as exemplified by these opinions that is criticizable. Thus, the District of Columbia Circuit, in decisions rendered between Filartiga and Amerada Hess, explicitly took cognizance of these considerations, and thus provided a blueprint that could have been developed in subsequent opinions and by commentators had they entertained a more inclusive conception of what is implicated by international law and the "international community" which such law ostensibly should regulate.

Tel-Oren v. Libyan Arab Republic was an action for compensatory and punitive damages brought by some Israelis against, among others, the Palestinian Liberation Organization ("PLO") to

59. As the Second Circuit succinctly states: "federal court jurisdiction [exists] for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations." Kadic, 70 F.3d 232, 236 (2d Cir. 1995). But as Judge Edwards has pointed out, the approach "places an awesome duty on federal district courts to derive from an amorphous entity—i.e., the "law of nations"—standards of liability applicable in concrete situations." See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781(D.C. Cir. 1984) (Edwards, J., concurring).
60. See supra note 60.
61. 726 F.2d 774 (D.C. Cir. 1983).
62. Plaintiffs also included citizens of the Netherlands and the United States, but their addition does not alter the ATCA doctrine—at least for the purposes of the ensuing discussion.
redress injuries sustained from armed attacks on civilian buses and cars in Israel which resulted in the death of thirty-four persons and the wounding of eighty-seven others. The ATCA was invoked as a jurisdictional basis for U.S. courts to adjudicate the resulting civil claims. Although all three appellate judges rejected the applicability of the ATCA, they did so on distinctly different grounds, all of which nonetheless share the commonality of recognizing the importance of structural analysis to the interpretation of the statute.

While asserting “adherence” to Filartiga, Judge Edwards of the District of Columbia Circuit, declined to find jurisdiction because he concluded that the PLO was not a state actor, and that the ATCA applied only in situations where the alleged violation of international law was engaged in by a state actor. Furthermore, Judge Edwards would appear to confine cognizable claims under international law only to those that satisfy his criterion of “definable universal and obligatory norms,” a standard that he readily acknowledged to be amorphous and thus poses problems for the application of the Filartiga Proposition. Of primary concern in the adjudicative process, he points out, is the difficulty of establishing—as a practical matter—applicable norms with authentic claim to internationalization so as to genuinely merit the description. This difficulty is compounded by his belief that the ATCA

63. Tel-Oren, 726 F.2d at 776 (Edwards, J., concurring.) But see id. at 799 (Bork, J., concurring) (indicating that 77 persons were wounded).

64. See id. at 775-77 (Edwards, J., concurring); id. at 799 (Bork, J., concurring); id. at 823 (Robb, J., concurring).

65. Id. at 776 (Edwards, J., concurring).

66. Id. Judge Edwards argues that while “official torture” may constitute an international law violation, “torture” engaged in by private individuals—as separate and distinct persons from officials acting on behalf of a state—is not considered to be a violation of international law. See id. at 793-94.

67. Id. (Edwards, J., concurring). Although it is unclear whether these norms are the same as “jus cogens,” (see infra notes 221-23 and accompanying text), Judge Edwards’ unwillingness to find “terrorism” as such a norm suggests a much more restrictive view of the role of United States courts in the formulation of the substantive text of “international human rights law” than does the Second Circuit. See id. at 795-96. Cf. Kadic v. Karadzic 70 F.3d 232 (2d Cir. 1995) (willing to find that allegations of “rape” and “forced prostitution,” despite the lack of historical grounding, constitute potential violations of international law cognizable under the ATCA).

68. See Tel-Oren at 783 (Edwards, J., concurring). It is instructive that unlike the Filartiga Court, Judge Edwards rejects as decisive the “repugnance” of the alleged conduct to “our own legal system.” Id. at 796.

69. See id. at 782 (stating that “[i]n the 18th century this pursuit [of ascertaining the ‘law of nations’] was no doubt facilitated both by a more clearly defined and limited body
was enacted to afford foreign litigants a U.S. federal alternative forum to state courts, thereby reducing the likelihood of parochial partiality in state courts, and therefore the chance that a foreign state would take offense at the treatment of its citizens by local courts of the United States.\textsuperscript{70} The consequence is at most a grudging acceptance of the Filartiga Proposition, which he would rather replace with an alternative formulation that would permit U.S. courts to assert jurisdiction where the foreign plaintiff can colorably allege claims under municipal law with some (regrettably poorly identified) international law component.\textsuperscript{71} For example, this formulation would apply where the claim is for "domestic torts that occur in the territory of the United States and injure ‘substantial rights’ under international law."\textsuperscript{72} The controlling factor would be whether adjudication of the claim by a U.S. court would avoid or mitigate international conflict between the United States and the country of the foreign plaintiff.\textsuperscript{73} This approach at least has the merit that it would expose the Filartiga Proposition to a more straightforward scrutiny, not as stating or defining controlling international law-created substantive rights, but simply as articulating U.S. domestic court jurisdiction.\textsuperscript{74}

\textsuperscript{70} See id. at 786-87.

\textsuperscript{71} Id. at 782.

\textsuperscript{72} Id. at 788. Judge Edwards equivocates on this alternative formulation, and suggests that U.S. court jurisdiction might also extend to "universal crimes," and to "torts committed by American citizens abroad, where redress in American courts might preclude international repercussions." Id. These assertions of jurisdiction, however, would be constrained by the "basic parameters that international law establishes for a domestic court’s exercise of jurisdiction over extraterritorial activities." Id. But it is precisely because the Filartiga decision seeks to restructure and rearticulate those parameters that the decision is worth arguing about.

\textsuperscript{73} Id. at 788.

Judge Bork, in his concurrence, provided some of that scrutiny. Working entirely within the framework of accepted U.S. jurisdictional doctrine, Judge Bork argued that the ATCA as a jurisdictional statute only authorizes federal courts to hear a particular type of a case—violation of the law of nations—but does not grant a plaintiff the right to bring the action. That right, if it exists, must be found in the law of nations itself. The law of nations, he contends, has never granted such a right to individuals, and such a right cannot be deduced through the application of the standard rules by which U.S. courts have gone about implying such private rights of action from public law—statutory or constitutional. Judge Bork argued that the crucial roadblock to implying a private right of action is found in the foreign policy concerns that are triggered by adjudication under the ATCA. These concerns, he asserts, are best left to the political (legislative and executive) branches of the U.S. government. The U.S. legal system, he points out, has developed two jurisprudential doctrines—the "Act of State" and the "Political Question"—precisely for such situations.


76. See Tel-Oren, 726 F.2d at 811 (Bork, J., concurring). Judge Edwards, while observing that "the noticeable absence of any discussion in Filartiga on the question [of] whether international law grant[s] a right of action" creates a problem as to the reach of the ATCA, tries to avoid this important interpretive shortcoming of Filartiga by reading the case as meaning that section 1350 opens the U.S. district courthouse door only to "aliens granted substantive rights under international law," and by conclusorily asserting that "it is appropriate to pause to emphasize the extremely narrow scope of section 1350 jurisdiction under the Filartiga formulation." Id. at 780 (emphasis added). But these are no solutions since, as the Second Circuit demonstrates in Filartiga, "substantive rights in international law" can apparently be cobbled together from a pastiche of pronouncements and documents that independently do not evidence any intent or interest to create a private right of action. See supra note 33 (listing documents relied on by Second Circuit, none of which advert to civil liability for derogation from the claimed international law obligation, let alone a private right to enforce those asserted rights).


78. See Tel-Oren, 726 F.2d at 801 (Bork, J., concurring).

79. Id. at 802-03. Cf. Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (confirming, through then-Judge Antonin Scalia, both the views of Judges Edwards and Bork that the ATCA "may conceivably have been meant to cover only private, non-governmental acts that are contrary to treaty or the law of nations," and that the "law of nations . . . does not reach private, non-state conduct").
Both Judges Edwards and Bork thus present structural arguments for their interpretation of the reach of the ATCA. They rely on well-developed jurisprudential relationships between private rights and judicial power, and between judicial and legislative powers. They also acknowledge and try to take seriously the practical and jurisprudential problems that arise when the courts of the United States seek to assert jurisdiction over claims having no connection with the United States; not even that of the nationality of the litigants. They accept that judicial systems are integral to the governmental structures of society, not apart from or independent of it, and that as such, the concerns of the judiciary are nationalistic in focus. Pretending otherwise is hardly the route to justice. Their arguments fall short, however, because they focus (perhaps understandably) on these relationships as they play out within U.S. domestic institutions. As such, these approaches fail to take cognizance of the structural claims of non-U.S. entities and persons in deciding the meaning and reach of laws whose effects, after all, are intended to regulate their behavior and liabilities. Given the interaction between judicial opinion-writing and legislative enactments, this omission can and has had significant consequences for the development of human rights law in U.S. courts, notably the enactment and interpretation of the Tort Victims Protection Act, a legislative accretion to the Filartiga decision.

Before developing these themes and their implication for contemporary understanding of customary international law, and the latter's place in the construction of a genuinely "international community," it is useful to look more closely at the Filartiga Proposition in the context of the structural issues that arise when litigating in United States courts. Familiarity with these issues provide a valuable backdrop for the perspective of international law whose adoption I urge in the subsequent parts of this essay.

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80. The approach of Judge Robb—the third-member of the Tel-Oren Panel—is equally structural. For him, all politically sensitive cases that arguably implicate foreign policy concerns should be shunted automatically to the political branches without inquiry as to the scope of the statute under which the plaintiff seeks judicial interpretation. See Tel-Oren, 726 F.2d at 823.


IV. INTERNAL CRITIQUE OF THE FILARTIGA PROPOSITION

Academic discussion of the Filartiga decision evinces three distinct thought patterns. By far the most numerous of commentators have focused on the substantive law issues the case presents. Generally laudatory in tone, these comments see Filartiga as providing an opportunity for the development of an enforceable set of substantive international law rules that would promote human rights norms.\(^\text{83}\) A second set of commentators focus on the correctness of the textual exegesis of the ATCA as adumbrated by Filartiga. Working within standard interpretive methodology, these commentators seek to uncover the "true meaning" of the ATCA by looking to its legislative history, prior and contemporaneous judicial and quasi-judicial material,\(^\text{84}\) and any other material that assists in ascertaining the intent and purpose of the enacting Congress.\(^\text{85}\)

Finally, other critics reject both the simple ends orientation and the archaeological approach for being insufficiently true to history, or insufficiently dynamic. For such commentators, the scope of the ATCA is best construed in terms of the contemporary purpose of the legislation, an investigation that demands both the unarchiving of the historical basis of the legislation, and bringing forward that purpose to accord with current notions of human

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\(^{84}\) Thus, commentators have looked to the "Opinions of Attorneys-General," "Blackstone Commentaries" on the "Laws of England," and the "Federalist Papers." See, e.g., Burley, supra note 11 at 476; see also infra note 85.

rights norms. All three necessarily focus on the ATCA as a positive statement of U.S. law that employs U.S. institutions to enforce U.S. norms and values. These commentators, both implicitly and sometimes explicitly, accord the interests of the international community, its norms, and its values a place in the analytical scheme, but only to the extent they can be subsumed satisfactorily within those of the United States.

Because I agree that those who seek to use domestic courts to enforce international customary norms must, at a minimum, work within the limits of those courts (and that it is probably unrealistic to demand more), I shall in this part explore how reliance on the ATCA to construct "international human rights norms" channels the inquiry into concerns and preferences that are at best provincial and that may perversely distort the proper functioning of the U.S. domestic judicial system while providing little in the way of a compensating furtherance of the "rule of law" in the international arena. What I provide is a fourth set of critiques of the Filartiga doctrine; one that is rooted in the structural limitations of the U.S. judicial system as a mechanism for announcing and implementing norms that are intended to be of universal application. That weakness, I shall argue, ironically flows from the acknowledged strength of U.S. courts as institutions that are responsive and accountable to the pluralist forces that have made the United States the triumphant experiment of our times.

A. The Domesticity of the ATCA

The ATCA is first and foremost a domestic statute of the United States, and although its language purports to incorporate the "law of nations," the one certainty is that its meaning and reach must be ascertained through those interpretive principles employed in the deconstruction of U.S. statutes. While those principles are dynamic and their specific articulation in flux, their constitutive core at the current time are well understood. Because a statute is considered as the expression of the will of the sovereign people acting through their representative legislature, the purpose

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of the interpretive process is to ascertain and to effectuate the intent of the legislative act. The plain meaning of the words used is the strongest guide to that intent. Legislative history, structure and purpose of the legislation are auxiliary tools that help clarify and guide the unavoidable judicial discretion that is inherent in the ambiguities of language.

The Second Circuit's construction gave much weight to the "plain meaning" of the terms "tort . . . in violation of the law of nations," while critics have relied heavily on the ATCA's legislative history. But as one commentator has pointed out, neither resort to language nor to the legislative history can conclusively determine the ATCA's reach. With regard to linguistic construction of the text, both the phrases "torts only" and "law of nations" are susceptible to varied constructions, and the Second Circuit surely is correct in asserting that the construction of these phrases cannot be restricted to the narrow particularistic linguistic turn these phrases had in the late eighteenth century independent of the values and concerns that they were intended to manifest. But the Court is equally incorrect to hold that the need to update linguistic meaning permits it to transpose that eighteenth century statute into a vehicle for righting any current wrong that can be associated, however tenuously, with the values and concerns that may have motivated the enactment of the statute. The simple response to such a position is that contemporary legislatures can enact appropriate legislation—as they have—to address contemporary concerns, and endow such legislation with well-considered scope, limitations and defenses in a manner that accurately balances the various interests at stake. Permissible updating must look to the

88. Although the Filartiga Court does not use the phrase "plain meaning" or "plain text"—presumably because those terms had yet to gain currency—the Kadic Court makes evident that this was the animating philosophy of the Court. See Kadic v. Karadzic, 70 F.3d at 232, 238 (2d Cir. 1995).
89. See, e.g., Sweeney, supra note 85; Dodge, supra note 85; Casto, supra note 85. Cf. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779 (Edwards, J., concurring) (relying on legislative history to suggest an alternative interpretation of the phrase "torts only in violation of the law of nations").
90. See Burley, supra note 11.
91. See Filartiga, 630 F.2d at 881.
93. Thus, the TVPA not only explicitly addresses who may be a plaintiff and who may be a defendant, but quite specifically the nature of the wrong for which a right of action exists, the period within which the lawsuit must be brought, the available remedies, and the requirement that local remedies in the foreign country first be exhausted. See 28
core of the statute, not simply to any plausible interpretation that can be given to it.\textsuperscript{94}

What is remarkable in the discourse of the \textit{Filartiga} Proposition is how much little attention has been paid to the core objective of the ATCA—a core that is itself not in dispute—and the extent to which that core objective necessarily limits the scope that can be legitimately assigned to the statute. After describing that core, I shall explain why current structural elements of the adjudication process reinforces limiting the reach of the ATCA to that core.

B. \textit{ATCA'S Core Purpose}

Notwithstanding the numerous decisions and articles that have sought to interpret the ATCA, and despite the extensive efforts at its archaeological reconstruction,\textsuperscript{95} Judge Friendly's observation that "[t]his old but little used section is a kind of legal Lohengrin"\textsuperscript{96} remains as true today as in 1975. The legislative history of the statute continues to be obscure, and that history is therefore singularly unhelpful in giving meaning to the reach and scope of the statute. Interpretation of the statute hence is confined to whatever meaning we can sensibly impute to the words used, and to our exploration of the background political and judicial structures that obtained at the time of its passage.

The ATCA's plain text and the background political environment in which it was enacted make clear that its primary—if not \textit{only}—purpose was to provide a federal judicial forum to foreign plaintiffs aggrieved in the United States by conduct that was in

\begin{footnotesize}
94. \textit{Cf.} \textit{Tel-Oren}, 726 F.2d at 775 (Edwards, J., concurring).
95. \textit{See, e.g.,} Casto, supra note 85; Dodge, supra note 85; Sweeney, supra note 85.
\end{footnotesize}
violation of the law of nations. Each of the elements of the statute directly responded to specific bottlenecks in the American political structure.

The need to explicitly authorize a federal forum grew out of the peculiar structure of the American judiciary. Unlike most countries—including other federal ones—the U.S. federal judicial system functions as a parallel and independent unit from those of the various states. It is a system of "limited powers," where authority that is not explicitly granted is presumptively denied. In the absence of the ATCA, then, a foreign plaintiff who might otherwise have a claim cognizable under the law of nations would either have to find some other explicit authorization under federal law, or would have to forego the federal forum. The latter was thought too high a prize to pay not only because of the assumed parochialism of state courts—an assumption amply supported by contemporaneous events involving resident foreigners—but also because it had the potential to constrain federal control over relations with foreign nations.

97. See generally Tel-Oren, 726 F.2d at 775 (Edwards, J., concurring). Two recent cases appropriately illustrate instances in which the ATCA might be invoked, subject of course to other valid defenses such as those of sovereign immunity. See, e.g., Martinez v. Los Angeles, 141 F.3d 1373 (9th Cir. 1997) (suit by alien against officials of U.S. municipality for allegedly conspiring with local authorities to have alien falsely imprisoned and tortured); Jama v. Immigration and Naturalization Service, 22 F.Supp.2d 353 (D.N.J. 1998) (suit against U.S. federal agency for torturing aliens detained as prelude to deportation).

98. The "diversity of citizenship" jurisdictional provision which was enacted as a companion of the ATCA could be no such alternative. It, however, created hurdles that were absent in the ATCA. There was a minimum "amount-in-controversy" requirement, and even where the claim was grounded on events occurring entirely within the United States, the foreign plaintiff could bring the action only against persons who were United States citizens. The passage of a "general federal question" jurisdictional statute in 1875 provided another alternative. Many federal courts properly have been reluctant to read Section 1331 as a grant of federal judicial power in the adjudication of claims of extraterritorial violation of international human rights laws.

99. Claims could of course be brought in state courts, a fact that remains true even with the enactment of the ATCA, but given the independence of state courts, federal judicial control over the development of case-law with potentially significant foreign policy controls would have been confined to the occasional instance where U.S. Supreme Court review was available. Many of those who enacted the First Judiciary Act did not find this a sufficient level of federal involvement in an issue—foreign policy—that was constitutionally committed to federal authority. Cf., Banco Nacional de Cuba v. Sabatino, 376 U.S. 398 (1964).

100. See, e.g., Casto, supra note 85, at 492-500.

101. As explained with regard to federal judicial power in THE FEDERALIST No. 80 (Alexander Hamilton): The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in
Similar concerns over the distribution of power between the American central government and the constituent states explain the ATCA's limitation of the type of suits that could be brought under its aegis to "torts only in violation of the law of nations." While the compromise of affording a federal forum to a foreign plaintiff responded to federal control over foreign policy, the "torts only" provision reiterated the special role of state courts (and, therefore, the limited authority of federal courts) in adjudicating general common law claims such as those involving breaches of contracts or domestic torts.\textsuperscript{102} Here, again, specific historical events involving whether states ought to honor duly contracted debts to potential foreign plaintiffs was a critical factor in the wording of the ATCA.\textsuperscript{103} 

Finally, at the time of the passage of the ATCA, there was no fully developed and accepted conception among American legislators as to the source of rights and obligations owed to and by aliens, present in the United States generally and the individual states. Were these aliens protected by the United States Constitution (which would entitle them to invoke its provisions to obtain redress for unlawful governmental action), or was their only source of protection that which was conferred by the "law of nations?"\textsuperscript{104} For some legislators, the American Constitution was a social compact entered into by the people of the United States, and it extended its benefits and obligations to all who were within the United States, citizens and non-citizens alike.\textsuperscript{105} For others, the Constitution was a compact among the states and regulated their relationship with the central government. The Constitution acted on the people only indirectly and through the mediation of the states. While the citizens of each state possessed as against the state the constitutional protections that the states had voluntarily ceded to the central government under the federal Constitution,

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any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.
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102. See generally Burley, \textit{supra} note 11, at 493.
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103. Thus, the phrase "tort only" made it clear that claims by foreigners brought against other foreigners, or against American citizens or states (but falling below $500) would be heard in state courts. Debates over the appropriate judicial venue for breach of contract cases involving debts contracted in connection with the War of Independence were foundational to the structure of the distribution of power between the federal and state governments. See, e.g., \textit{Martin v. Hunter's Lessee}, 14 U.S. (1 Wheat.) 304 (1816).
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105. \textit{Id.} at 934-36.
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the alien could claim no such direct intervention on her behalf from the federal government vis-a-vis the state. The alien thus possessed only those rights that each state was willing to accord the alien independent of constitutional mandates.\textsuperscript{106} For both groups, however, the alien was entitled to whatever protection was customarily accorded a foreign sojourner under the customs of the "law of nations," a right thus confirmed by the ATCA.

Whether one focuses on the events surrounding the enactment of the ATCA, or on the dominant political philosophy of the period, the conclusion seems inescapable that it was a statute which reflected the limited role of federal courts in adjudicating claims brought by aliens with regard to conduct occurring in the United States. The ATCA thus was a compromise that related to power distributions within the United States. The articulation of the rights of the foreign plaintiff must be understood in these terms: a channeling among the American courts of the processing of whatever claims foreign plaintiffs have for acts done in the United States or by United States nationals. The ATCA created no new right independent of these concerns.\textsuperscript{107} Most directly, there is no evidence the ATCA was intended to address the issue of the extra-territorial reach of U.S. courts.

Supporters of the Fijartiga decision, however, do not rest their arguments on the historical background of the ATCA. When their arguments are not framed as a moral crusade, they rely on updating the text of the statute. Since the text speaks in terms of "violation of the law of nations," they contend, its modernization embraces tortious conduct in violation of current international law norms. These norms, we are told, are "universal," and as such can and should be enforced by each state without regard to the nationality of the violator or the place of wrongful conduct.

But this textual approach which conflates the subject matter of a violation with the right to obtain relief for the violation in a particular forum ignores the quite simple point that the propriety of a court hearing a case depends as well on the personal right of a party to bring a case, and, therefore, of the defendant to be

\textsuperscript{106} Id. at 932-34.

\textsuperscript{107} Cf. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring) (stating that "[t]he law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations").
brought before the court. That defense is itself a "human" (or at least a civil) right. Whatever may be its moral basis for doing so, a judicial system sidesteps the consideration of the personal rights at stake at substantial cost to its integrity.

In short, the Filartiga Proposition is wrong in holding that the ATCA was the source of any independent right of an alien plaintiff against a defendant, and that such a right is exercisable to redress wrongs done outside of the United States. But that error is not simply the product of a misreading of text and history. For fundamentally structural reasons, it does injustice to the concept of the rule of law whether viewed from the vantage point of the integrity and institutional interests of American judicial processes—which is not my primary concern in this essay—or from the interests of the various outsiders upon whom United States judicial power is hegemonically enforced, which constitute the foci of my interest in this article.

As an interpretive matter, there is a well-developed presumption in United States law that general legislative prescriptions op-

108. For a notable exception, see D'Amato, supra note 86. His argument, however, is flawed. He is right, I think to criticize Judge Bork's use of the term "cause of action" given the troubled history of the term. Id. at 95. Cf. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). His effort to conflate the existence of subject matter jurisdiction and the right to sue, however, is unpersuasive. The heart of his argument, analogizing the "law of nations" to the Roman concept of jus gentium, is at best an elaboration of the appropriate choice of law rules, but it does not itself provide the positive source of the substantive right to sue. Congress could of course have provided that right—as it has done with regard to the Torture Victims Protection Act—and instructed that the law of nations be applied, but for reasons explained in the text, the ATCA (and certainly not the federal question jurisdictional statute, 28 U.S.C. § 1331) cannot be read to have accomplished that task. Where then does the right to sue come from? Professor D'Amato's critique fails to supply the answer.

109. Cf. Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 815 (1997) (contending that cases like Filartiga which hold customary international law as substantive federal common law undercut the balance of federalism struck by the Erie R.R. Co. v. Tompkins line of cases); A.M. Weisburd, State Courts, Federal Courts, and International Cases, 20 YALE J. INT'L L. 1 (1995); Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. PA. L. REV. 1245 (1996). That this essay does not focus on the integrity and institutional concerns of the U.S. judicial process is, of course, not a statement on the importance of those factors for the proper interpretation of the ATCA. Indeed, as a practical matter, those concerns are more likely to be decisive in the construction that the U.S. Supreme Court ultimately accords ATCA than those presented in the remainder of this piece. Legal principles ought to be concerned, however, with more than pragmatics, and the voice of the outsider, even when condemned to baying at the moon, is entitled to at least one bark.
erate territorially, or at most bring within the amits of its prohibitions only the conduct of "nationals". Even under the most far-reaching understanding of the principle of extraterritoriality—the so-called "effects doctrine,"—there is the insistence that an offensive conduct outside of the United States by non-U.S. nationals have some effect in the territory of the United States, on its gov-

ernment, or at least on U.S. nationals. This presumption is not an irrebuttable one, but as will be developed in the remainder of this piece, the ATCA is hardly a candidate for setting that presumption aside. Indeed, for reasons of accountability which are integral to the rule of law, it is a perverse use of power to construe the ATCA in the manner that the Filartiga Proposition does.


111. See generally Neuman, supra note 103, at 966-69 (discussing the seminal case of Reid v. Covert, 351 U.S. 487 (1956)). The scope of the concepts of territoriality and of nationality are of course contested; but neither term embraces a global sweep for nor reach of U.S. laws and the jurisdiction of its courts.

112. This so-called principle of "passive personality" is often coupled with that of "pro-
tective jurisdiction" (said to be available in cases of "national security") and together, they have been employed by the United States in highly controversial cases to justify criminal trials in the United States for acts occurring outside of the United States. See, e.g., United States v. Rezaq, 134 F.3d 1121, 1133 (D.C. Cir. 1998) (trial in the U.S. of a Palestinian for aircraft piracy involving an Air Egypt flight over the Mediterranean, where a U.S. citizen was selected and shot to death on account of her nationality); United States v. Yunis, 681 F.Supp. 896, 901-03 (D.D.C. 1988) (trial of Lebanese citizen in U.S. court for the hijack of a Jordanian aircraft where three hostages were American citizens). Cf. Flatov v. Iran, 999 F.Supp. 1 (D.D.C. 1998) (wrongful death action on behalf of American citizen killed by a bomb in Israel). Aside from the fact that the U.S. Supreme Court has not ruled yet on the viability of the "passive personality" principle, noteworthy about these cases are two points that put them clearly outside of the Filartiga line of cases. First, the basis of the claim for their extraterritorial reach is usually founded on a good deal more explicit statutory language than the very abstruse wording of the ATCA. Compare United States v. Roberts, 1 F.Supp.2d 601 (E.D.La. 1998) (holding that language in a criminal statute extending its reach to the "special maritime and territorial jurisdiction of the United States" authorized assertion of jurisdiction on passive personality grounds to prosecute a foreigner in a U.S. court for engaging in a prohibited "sex act" with an "American minor" on the high-seas) with United States v. James-Robinson, 515 F. Supp. 1340 (S.D. Fla. 1981) (holding that the court lacked jurisdiction to entertain the prosecution of foreign nationals for possession of a controlled substance on the high seas where there was no indication they intended to bring the product into the United States). Second, tenable arguments can be made in all of these cases for the existence of direct effects in the United States or at least of substantial impact on United States nationals. Although some commentators have sought to bring the Filartiga Proposition within the related but quite different concept of "universal jurisdiction," (see infra notes 211-14 and accompanying text), no one has claimed that the effects doctrine creates a basis for the assertion of extraterritorial jurisdiction in the Filartiga line of cases.
C. Extraterritoriality and the Litigation Process

It is generally acknowledged that the exercise of jurisdiction over claims arising from events which take place outside of the political jurisdiction that creates the adjudicating tribunal raise fundamental questions of prescriptive power.113 Essentially, such extraterritorial assertion of power poses three interrelated sets of issues: (1) institutional competence; (2) fairness; and (3) identity and subjugation. The last, predominantly external to the concerns of the adjudicating regime, is dealt with in the next section. The following material explores the extent to which the problems of institutional competence and fairness are exacerbated by three structural pillars of U.S. civil litigation: the adversarial process, the class action device, and the jury trial. These processes, which may very well promote the realization of justice in domestic adjudication, function to undercut it when applied to Filartiga-type extraterritorial adjudication.114

1. Inadequacy of Adversarial Representation

Belief in the efficacy of adversarial representation is the linchpin of U.S. judicial process. Adversariness—by which is meant “each for each and the state for neither”—configures the process from

113. Four issues are embraced by this concept. First, does the state have the power to regulate the conduct in question? Second, assuming the power to exist, has it actually legislated in the area? Third, does the regulation include the right to bring the lawsuit in question? Fourth, are the parties nonetheless properly before the court? These issues are sometimes confusingly conflated by the phrases “prescriptive,” “subject matter” and “personal” jurisdiction. See, e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795-96 and n.22 (1993); id. at 812-13 (Scalia, J. concurring in part and dissenting in part); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). Cf. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES §§ 402 & 403 (1987). Although positivistic sounding claims are sometimes advanced as responses to the first question, the consensual underpinnings of “international law” often means that the discussion of whether a state has the power to regulate can be framed only in normative or descriptive terms. Positivistic responses can be made with regard to the last three issues, but only in the context of the municipal law of the particular society that has purported to regulate (or withhold regulation of) the conduct at issue.

114. Two factors that may create an exception to the presumption against extraterritoriality are when the out-of-state conduct causes substantial in-state effects, and when the exercise of such jurisdiction would otherwise be “reasonable.” See, e.g., Hartford Fire Ins. Co., 509 U.S. at 796; Aluminum Co. of America, 148 F.2d at 444; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES §§ 415-416, 423. Assertion of jurisdiction under the Filartiga Proposition does not require that there be any United States-based effects. See infra Part IV. Assuming that the “effects” and “reasonableness” standards are in the disjunctive, what follows challenges any claim that it is “otherwise reasonable” for a U.S. court to assert subject matter jurisdiction over human rights claims occurring entirely outside of the United States.
the earliest stage of defining and shaping litigable issues to the thoroughness and completeness of fact-gathering, and the significance and finality of the consequences of mistakes, discretionary judgments and mandatory rules. So interwoven is it with the idea of just adjudication that representation by one trained in its finer points, i.e. a litigation lawyer, is a virtual necessity. Each litigant, acting through its representative, is responsible for advancing the theories of the claim, for obtaining facts in support of those theories, and for convincing independent fact-finders and principled legal arbiters that the litigant is entitled to prevail. In its idealized form (that is, its default rhetoric), truth emerges from the supervised conflict where the role of the state—the judge and the jury—is that of an honest broker.

There are of course acknowledged flaws in the adversarial system. There is, for example, the likelihood that the system is skewed in favor of the litigant with greater command of and/or access to economic wealth and, perhaps, sociological connections including education and racial identification. Similarly, by relying on private motivations, it may prove to be collectively inefficient, consuming more social resources than need be the case. And, of course, there is no assurance that there will not be a miscarriage of justice.

Yet the adversarial system, like private enterprise, is well adapted to the ethos of American society. Indeed, as it currently functions, it is a product of the trials, tribulations and successes of the society. It is not only a paean to the efficacy and optimality of individualism and entrepreneurship in the adjudicatory process (much in the same way that self-interest is in the context of orthodox liberal economic thought), but it has proved its mettle over-time, commanding high acceptance in the society and imitation by others.

But what might be a tolerable skew in the domestic adjudicatory process can and has proven to be a substantial shortcoming in the context of Filartiga-type adjudications. Effective representation demands the possession of or ready access to substantial legal talent by the litigants, and within reason, willingness by the talent to be associated with the cause being litigated. In domestic litigation, extensive networks of public policies are geared at meeting these needs through the encouragement of volunteer legal assistance, the funding of legal aid offices, the formation of nonprofit “education and defense funds,” and, occasionally, the outright mandating of the provision of legal representation to those unable to afford
private representation.\textsuperscript{115} There is, in essence, an atmosphere that recognizes and seeks to mitigate the effects of limited access to legal representation in the adversarial process.

The litigation of alleged extraterritorial violations of human rights in U.S. courts evokes a sharply different environment. The vast majority of the cases have been brought by high-profiled advocacy groups, and usually against former rather than present government officials. These actions are then invariably prosecuted as “default cases” in which the defendant, shorn of any meaningful capacity to engage in a vigorous defense, declines to contest the action, and the governing law is thus made on the basis of uncontradicted pleadings and the oracular pronouncements of academics and other alleged experts. This is the case either because the defendant, having no substantial connection to the United States, is ill-equipped to obtain counsel, or because the defendant simply lacks the means—financial or know-how—to do so.\textsuperscript{116} Moreover, because these lawsuits seem invariably directed at defendants who are no longer in power,\textsuperscript{117} these pleadings and adjudications speak to the past, and not to ongoing wrongs.

There is no denying the importance of bringing to light and public opprobrium the atrocities contained in many of these well-drafted pleadings, but surely, the legal system ought to insist that it does not merely duplicate newspaper and television reports. If the legitimation of the truths rendered by the system depend on the workings of the adversarial system, victories invariably obtained through default judgments ring hollow.\textsuperscript{118} They may satisfy the popular advocate’s sense that Western society ought to “do something,” but they should also challenge our conception of whether this is indeed the “thing” to be done, even in the highly ephemeral sphere of justice that litigation inhabits.\textsuperscript{119}

\textsuperscript{115} See, e.g., 28 U.S.C. § 1915. Other statutes, such as 28 U.S.C. § 1988 and the Equal Access to Justice Act, 28 U.S.C. § 2412, are intended to encourage the filing of meritorious claims of social significance by shifting the cost of legal representation in certain types of actions from those who would normally have borne it to the losing party.

\textsuperscript{116} See, e.g., Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996).

\textsuperscript{117} Given the Supreme Court’s decision in Argentina v. Amerada Hess, 488 U.S. 428 (1988), it is indeed unclear whether an actively functioning government official can ever be sued under the ATCA. Dicta in the Second Circuit’s decision in Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) suggests that such a suit may be tenable if the official is sued in her “individual capacity”.

\textsuperscript{118} This hollowness is not solely intellectual. Default judgments hardly assure the victorious victims that they will actually be compensated.

\textsuperscript{119} This argument is developed further at Part VI-B, infra.
2. *The Class Action Device*

One of the more controversial uses of the *Filartiga* Proposition is the filing of class actions on behalf of sizeable or indeterminate numbers of persons whose international human rights allegedly were violated by the defendant.\(^{120}\) At first blush, this innovation seems remarkably adapted to the objectives of promoting international human rights through adjudication. Fostering human rights, after all, is effective only when the restraint is applied to wrongful conduct of general application, and the class action device is a potent weapon for aggregating the interests of the victims, and bringing the consequences of the wrong to bear forcefully on the wrongdoer.

But even if one accepts the propriety of using this collective action device to advance the individualistic interest that is the paradigmatic description of civil litigation, its application in the context of extraterritorial litigation demands pause for consideration. Shortcomings in the use of the class action exist in the nature of the interests to be aggregated, the adequacy and propriety of the representation afforded those interests, and the completeness of the relief available. These difficulties arise because the apparatus of litigation is grounded on the conception of a well-informed self-regarding individual or entity acting to promote her own best interests. The class action device seeks to aggregate these interests without fusing them into a unitary whole. Each member of the class therefore continues to retain a differentiated personal interest in the litigation. How the system deals with these collected but highly personalized interests has been a source of much writing.\(^{121}\) Of particular interest is the emerging recognition that some interests are much better suited for aggregation than others, and that the determination of the propriety of aggregating interests is best made after substantial exposure through individual litigation of the issues presented by the interests at stake.\(^{122}\)

These are particularly pertinent considerations in litigating extraterritorial claims of human rights violations. Being subjected to

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\(^{120}\) See generally *Kadic*, 70 F.3d 232; *In re Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1995); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).


\(^{122}\) See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).
torture, it would seem self-evident, is a very personal experience, and to the extent that one of the asserted benefits of civil litigation is to provide the torture victim the catharsis of directly confronting the torturer, it is questionable whether the class action device is appropriate. Indeed, the highly unconventional methodology—even for purely domestic cases—employed in the one class action case in this area that has been reduced to judgment presents significant problems for justifying the use of the class action device either as a means of “bringing closure” to the pains inflicted on victims of extraterritorial torture, or for monetarily compensating them for their injuries. In *Hilao v. Marcos*, the court adopted a very controversial method for adjudicating the “nearly 10,000” individual cases arising out of various claims of “torture,” “disappearance” and “summary execution,” purportedly engaged in by the Philippine military and paramilitary forces under the command of Ferdinand E. Marcos between 1972 and 1986. Following the certification of the claims of the victims (including survivors of deceased claimants) as a single class action, the Court trifurcated the trial by having a single determination of liability, while bifurcating the determination of damages into a compensatory phase and a punitive phase. In determining liability to so many victims over such an extended period of time for conduct involving so many government officials, there is little in the report of the trial that demonstrates the individualization of the stakes at issue. Yet, as the U.S. Supreme Court has made clear, class action litigation exists to vindicate individual interests, and where it is likely that individual treatment would predominate over common questions of fact, it is inappropriate to resort to class action.

It may seem that the shortcomings of the class action lawsuit for dealing with the wide variety of instances in which alleged claims of torture may arise can be ameliorated at the compensation phase through the individualization of the determination of the compensation due. But as the *Hilao* trial court proceeding demonstrates,

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123. *See In re Estate of Ferdinand Marcos*, 103 F.3d at 767.
124. *Id.*
126. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). Noteworthy in *In re Estate of Ferdinand Marcos* is the grounding of liability “on the military members’ statements to their victims in determining that an agency relationship existed between Marcos and the individuals who tortured the plaintiffs or their decedents.” 103 F.3d at 775. Oral representations are particularly inapposite for finding commonality or typicality of facts or interests, and therefore undercut the viability of the class action device in such situations.
this is rarely the case. In *Hilao*, the trial court randomly selected 137 out of 9,541 adjudged “facially valid” claims. Relying on the testimony of experts that this random selection would achieve a “95% statistical probability that the same percentage determined to be valid among the examined claims would be applicable to the totality of claims filed,” the court used data gathered in connection with these 137 cases to determine not only the amount of damages due to the entire class, but the percentage of the claims that were nonmeritorious. Finding that 6 of the 137 claims did not satisfy the grounds for liability, the court applied a “5% invalidity rate” to the 9,541 claims that had been deemed facially valid. Compensation for these statistically derived valid claims was determined by relating the percentage of the 131 claims that fell into each of the three categories of “torture,” “disappearance” and “summary execution” to the 9,541 claims deemed facially valid, and by assigning value to each of these classes of claims.

127. *In re Estate of Ferdinand Marcos*, 103 F.3d at 782. *But see id.* at 787 (Rymer, J., concurring in part and dissenting in part). *Hilao’s* statistical expert, James Dannemiller, created a computer database of the abuse of each of the 10,059 victims based on what they said in a claim form that assumed the victim’s torture. Although Dannemiller would have said that 384 claims should be examined to achieve generalizability to the larger population of 10,059 victims within five percentage points at a 95% confidence level, he decided that only 136 randomly selected claims would be required in light of the “anticipated validity” of the claim forms and testimony at the trial on liability that the number of abuses was about 10,000. He selected three independent sample sets of 242 (by random selection but eliminating duplicates). *Hilao’s* counsel then tried to contact and hold hearings or depositions with each of the claimants on the first list, but when attempts to contact a particular claimant proved fruitless, the same number in the next list was used. When the sample results for the first 137 victims proved insufficient to produce the level of sampling precision desired for the project, *Hilao’s* counsel continued from case 138 to case 145. Eventually, 124 were completed from list A, 11 from list B, and two from list C.

128. *See id.* at 782. Thus, of the 137 claims, a Master appointed by the trial court suggested that 6 should be rejected as not meeting the following criteria: “(1) whether the abuse claimed came within one of the definitions, with which the Court charged the jury at the trial . . ., of torture, summary execution, or disappearance; (2) whether the Philippine military or paramilitary was . . . involved in such abuse; and (3) whether the abuse occurred during the period September 1972 through February 1986.” The jury concluded, however, that only two of the 137 claims should be rejected. *Id.* at 782-83.

129. *Id.* at 784 n.10.

130. *Id.* at 783. Of the 131 claims, 64 were classified as “torture” claims with an average value of $51,719. 50 as “summary execution” claims with an average value of $128,515, and 17 “disappearance” claims with average value of $107,853. The exercise seems to exclude the possibility of a victim of summary execution or of disappearance could also have suffered torture, or at least appears not to distinguish between a victim of either claim by itself from one who, in addition to having been summarily executed or “disappeared,” was also subjected to torture. Also unclear is the effect of the jury determination that there were 67% (two rather than six) nonmeritorious claims within the 137 randomly selected claims.
And at the conclusion of this highly sophisticated analysis, it appears that not one of the purported class victims will be able to recover the calculated compensation in the United States. If relief is to be obtained, it must apparently come from the courts of the Philippines, which may, after all, adopt a distinctly different framework both for adjudging liability and for calculating appropriate compensation.

Thus, as U.S. domestic litigation experience has demonstrated again and again, and the Marcos litigation confirms in the extraterritorial setting, class action litigation, whatever may be its administrative merits, hardly enhances the promotion of the humanizing norms presumably at the core of human rights. In fact, it depersonalizes the issues at stake. Mired in quarrels over statistical samplings, focus all too easily shifts from the tragic and human stories the litigation is supposed to recreate and the sense of personal worth litigation should vindicate. The lawyer, the statistician and even the judge may glory in the vindication of their professional, technocratic and managerial skills, but it is hard to imagine how the class victim thousands of miles away from U.S. shores and with at most the dimmest conception of the complicated proceedings that go on in American courthouses can possibly share a sense of justice from those proceedings. Even where the class ultimately prevails and monetary relief is awarded—a fact likely to be heavily trumpeted to class members—we may ask whether there are not alternative ways of obtaining such relief and with greater assurance that the victim would receive actual compensation.


132. As Judge Rymer, in his partial dissent in In re Estate of Ferdinand Marcos, aptly points out, "[t]hus, causation and $766 million compensatory damages for nearly 10,000 claimants rested on the opinion of a statistical expert that the selection method in determining valid claims was fair to the Estate and more accurate than individual testimony." 101 F.3d at 788.

133. In re Estate of Ferdinand Marcos presents the strongest case that can be made by proponents of the use of the class action in extraterritorial class action litigation. It did at least involve the telling of their stories by a few alleged victims to someone that they perceived to be in authority. None of the human rights cases so far have involved direct face-to-face confrontation between the victim and the alleged torturer. Neither the class action device nor the ease with which default judgments are granted to self-proclaimed activists will facilitate the realization of this human dimension of the litigation process.

134. In this context, it is interesting to compare the "successful" litigation of the Marcos class action with the processing of claims in the Bhopal disaster. The Marcos assets that might be used to compensate victims of the regime remain, at the time of this writing, either frozen in Swiss banks or remain the source of independent litigation in the Philippines. Meanwhile, the efforts of the self-appointed American lawyers of the Filipino class
one thing when the vicissitudes of litigation result in disappointing
a single individual, it is quite another thing when many with raised
expectations are subjected to that disappointment. Further, the
preclusive effect of a self-styled class action litigation is likely to
have broader social consequences than would be the case in a typi-
cal individual action.

There is of course one way in which the class action device can
prove to be an effective litigation tool—where it is wielded not to
vindicate the aggregate of otherwise individualized interests, but as
the exemplification of ideological group interests. Thus, in a case
like *Kadic v. Karadzic*, the litigation would be significantly less
about providing a specific remedy for the alleged victims of rape,
as it would be for vindicating the civil rights of women by bringing
alleged Serb rapists to book.

Whether or not the class action device would function effec-
tively in this guise, its justification along this line suffers from two
difficulties. First, it runs contrary to the often repeated purpose
for its use; namely as a tool for vindicating individual rather than

members to obtain injunctions against the Filipino government and Swiss banks have
amounted to little more than tangential litigation with the attendant delays in reaching
finality that such litigation practice invariably produces. *See*, e.g., Credit Suisse v. United
States District Court for the Central District of California, 130 F.3d 1342 (9th Cir. 1997)
granting mandamus to dismiss the effort of the *In re Estate of Ferdinand Marcos* class
plaintiffs' attempt to attach the Marcos assets in Swiss banks through injunctive action
against Swiss banks in the United States. Although arising from a different context, much
of the effort to convert U.S. courtrooms into universal sources of remedy for injuries out-
side of the United States was glaringly foreshadowed by the litigation *In re Union Carbide
Corporation Gas Plant Disaster at Bhopal*, India, 809 F.2d 195 (2d Cir. 1987), where U.S.-
based lawyers (and indeed for a while the Indian government) reflexively resorted to the
American courts to obtain compensation for injuries suffered as a result of a mishap in
India at a factory jointly owned and operated by an Indian and an American corporation.
The essential rationale for the automatic resort to U.S. courts was that the Indian judicial
system was incapable of providing adequate relief. *Cf. In re Petition of Chesley*, 927 F.2d
60 (2d Cir. 1991) (declining to grant attorneys' liens against a settlement fund on deposit in
India under the supervision of the Supreme Court of India). Yet, the consequence of the
rebuff by U.S. courts of the effort to externalize the processing of Indian tort litigation has
been, by all accounts, salutary for the Indian judicial system.

135. 70 F.3d 232 (2d Cir. 1995), reh'g denied, 74 F.3d 373 (1996).
136. *See*, e.g., Rachel Bart, *Using the American Courts to Prosecute International Crimes
Against Women: Jane Doe v. Radovan Karadzic and S. Kadic v. Radovan Karadzic*, 3 CARDozo
WOMEN'S L.J. 467 (1996); Michele Brandt, *Doe v. Karadzic: Redressing Non-
State Acts of Gender-Specific Abuse Under the Alien Tort Statute*, 79 MINN. L. REV. 1413
(1995); Jennifer Green et al., *Affecting the Rules for the Prosecution of Rape and Other
Gender-Based Violence Before the International Criminal Tribunal for the Former Yugo-
group rights. Second, it undercutsthe arguments of proponents of human rights litigation in U.S. courts who contend that their goal is the righting of individual wrongs, not the prosecution of societies.

Thus, although the class action device may seem to promise a vehicle for efficient social vindication of human rights norms, its aggressive use cannot be squared with the individualized facts orientation or case-by-case adjudication that American common law prides itself on, and it is ill-equipped as an instrument of ideological warfare. Rather, both theory and experience strongly suggest that the most that can be said of the class action device is that it furnishes the illusion that “something is being done,” which, while perhaps sufficient to assuage the expectations of a voyeuristic society, surely does not satisfy the purposes and needs of those victims that resort to civil litigation.

3. Trial by Jury

That much of the contemporary promotion of human rights through U.S. domestic courts is driven by a remarkably parochial conception of justice is nowhere better demonstrated than the eulogizing of the American jury composed as it is of “ordinary Americans” as the instrument for bringing about such justice.


138. For additional examination of this argument, see infra notes 253-56 and accompanying text (discussing the hegemonic pull of human rights litigation).

139. The tendency of judicial opinions to read more like press releases by the plaintiff (rather than an impartial evaluation of the facts) is an all-too-familiar feature of ATCA decisions. Thus, the Court in Alejandro v. Cuba, 996 F.Supp. 1239, 1242 (S.D. Fla. 1997), speaking for itself, asserted: “[t]he government of Cuba, on February 24, 1996, in outrageous contempt for international law and basic human rights, murdered four human beings in international airspace over the Florida Straits.” Surely, the position of the defendant as an outsider with no voice in the community is not an inconsequential factor in the generation of such rhetoric. Should we doubt that the care and dispassion accorded the issues are similarly free of parochial biases? Thus, consider that in Flatow v. Iran, 999 F. Supp. 1, 34 (D.D.C. 1998), the District Court judge expressed his American patriotism by awarding—in a default judgment—$100,000,000 more than was sought by the plaintiffs. But emblematic of the shortsightedness of such judicial demonstration of national patriotism has been the laughable spectra, under a regime of the rules of law, of the United States Department of State, which had sided actively with the Flatow plaintiffs in instituting their action, frustrating the plaintiffs’ effort to collect on the judgment awarded to them by the trial court. See Bill Miller and John Mintz, Once-Supportive U.S. Fights Family Over Iranian Assets, WASH. POST, Sept. 27, 1998, at A8.

140. See, e.g., Fitzpatrick, supra note 10, at 491. The arguments advanced in this section readily accede to the dominant belief that while the American jury system has its flaws, it...
But aside from a reflexive embrace of the familiar, it is difficult to understand why proponents of the use of domestic courts to adjudicate extraterritorially based human rights claims find virtue in the use of the jury—as contrasted, for example, with a bench trial.

The idealized justification of the American jury system lies in its approximation of the virtues of the democratic principle. Ordinarily, members of the jury are representative of the community, and they bring the various “voices” of the community to bear on the adjudication. More than that, the process for reaching a decision is not only based on consensus or the persuasion of a supermajority of the jurors, but the end-result is arrived at only after considerable deliberation. But it is precisely these “strengths” of the American jury that renders it an unsuitable instrument for promoting international human rights claims; for it can do so only at some cost to the intellectual coherence of its idealized justification.

Absent from the hospitality American society generally accords to foreigners are two rights thought to be central to citizenship: the right to vote and the right to sit on a jury. The withholding of these rights to noncitizens may be defensible as enhancing the

functions remarkably well as a societal instrument for doing justice. See, e.g., Kenneth S. Klein, Unpacking the Jury Box, 47 HASTINGS L.J. 1325, 1328-29 (1996). See generally Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy (1994). The core of the claim advanced here is limited to the proposition that regardless of the flaws and strengths of the system, reliance on the use of the “American jury” in the litigation of international human rights claims brought in American courts does not strengthen the legitimacy or acceptability of the resulting verdict or judgment.

141. See, e.g., Abramson, supra note 140; Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131 (1991).


143. Nothing in the United States Constitution forbids the extension of these rights to foreigners, and in principle, different political jurisdictions could treat these issues differently. The federal government, within whose primary jurisdiction lies the regulation of foreigners, has not extended these rights to aliens—even those who are classified as “permanent residents”—and only one or two municipalities have attempted to accord to foreigners the right to vote. See Beth Kaiman & Lynne K. Varner, Takoma Park Residents Favor Vote For Non-Citizens in City Elections, WASH. POST, Nov. 6, 1991, at A30 (reporting on the result of a nonbinding referendum by the residents of Takoma Park, Maryland, “toward giving non-U.S. citizens the right to vote in city elections”). Since courts are controlled either by the state or the federal government, it is doubtful that individual municipal jurisdictions can extend the right to sit on a jury to foreigners without prior authorization by a state or federal government.
democratic norm of direct accountability (epitomized in the famous American revolutionary chant of "no taxation without representation"), but for that very reason, a jury with no foreigners on it lacks the legitimacy to preside over claims arising outside the state and which involves parties none of whom are members of the political community.\textsuperscript{144} Even if, as some argue, international human rights represent values that are "universal,"\textsuperscript{145} the interpretation of those values in the particular case by complete strangers to the environment in which the alleged events took place, and who lack any practical interest in the future structure of that environment surely denude their decision of the indicia of democratic legitimation.\textsuperscript{146}

Nor is the injustice of the mechanism rescued by the theoretical availability of the deliberative process in the jury room. Regardless of how brilliantly the lawyers perform in the courtroom, and even assuming a most attentive and unprejudiced jury, the jurors will be deliberating about facts that at best they can only dimly perceive, and which, for the most part, neither their daily existence nor their readings provide them with meaningful reference points. In such a setting, one might as well take the position that justice can be ascertained by simply consulting the reportage of newspapers and television cameras.

\textsuperscript{144} Unlike contemporary American practice, English common law practice has not always excluded foreigners from the jury box. Indeed, quite early in its history, the practice was for "Trials de medietate linguae," where one party was a foreigner whose native language was not English. In such cases, one half of the jury was composed of noncitizens and the other half of citizens. \textit{See}, e.g., \textit{Kevin R. Johnson, Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens}, 21 \textit{Yale J. Int'l L.} 1, 9 (1996); \textit{Marianne Constable, The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge} 4 (1994) (dating the "half-alien" jury practice from before 1353 and lasting through 1870). It should be noted that the first formalization of the practice (1353) did not simply decree for the involvement of foreigners in the trial of a foreigner, but also provided for a jury composed entirely of foreigners where the dispute was solely among foreigners. \textit{Id.}


\textsuperscript{146} In this, current jury practice is a good deal less representative of the community than was the practice in "autocratic" medieval England. As Professor Constable effectively demonstrates, the "mixed-jury system" of that period "constitute[d] a practice in which matters of community membership, truth and law [were] inextricably intertwined." \textit{Constable, supra} note 144, at 1.
D. Sovereign Immunity

One last consideration is relevant to the critique of the ATCA actions from within U.S. domestic law jurisprudence. As is the case in international law, lawsuits against unconsenting sovereigns presumptively are disallowed under U.S. domestic law.\footnote{147} This immunity exists by virtue of both statutory and common law prescriptions, and are derived both from the expressed language of the laws, as well as interpretive canons.\footnote{148} While the grounds for the rule—and its exceptions—vary and fluctuate with issues of jurisdiction, liability, relief and enforcement of judgment, three features of the doctrine are particularly noteworthy in the context of the ATCA actions.

First, there is statutory codification of the common law (or traditional customary) presumption that favors the immunity of sovereigns from suits brought in United States courts.\footnote{149} Although the presumption has been statutorily lifted in many instances—such as those involving the “commercial” and “tort” exceptions to the Foreign Sovereign Immunities Act (“FSIA”),\footnote{150} the ensuing abrogation of the immunity has been circumscribed by specific protections that are tailored to balance three quite distinct interests: an injured plaintiff’s claim to relief, the ideological or “dignity” interests of the sovereign, and the functional costs and benefits of making the sovereign defendant accountable in damages for the alleged injury. Thus, to take the “Torture Victims Protection Act,” the most salient of the statutes abrogating sovereign immunity, we find that the claim of sovereign immunity is dispensed with only under the following conditions: (i) the foreign official must have acted under “actual or apparent authority, or color of law” of a foreign nation;\footnote{151} (ii) conduct giving rise to liability is


\footnote{148} One such canon of interpretive construction which infuses all discussions of sovereignty, whether in the context of constitutional, statutory or common law analysis, is that absent an “unmistakably clear” expression of intent to alter the usual constitutional balance between the States and the Federal Government, the courts interpret a statute to preserve rather than destroy a state’s “substantial sovereign powers.” See Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (citations omitted).

\footnote{149} See 28 U.S.C. § 1604.


\footnote{151} See 28 U.S.C. § 1350 n.2(a).
limited to "torture" or "extrajudicial killing;" 152 (iii) the claimant must have "exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred;" 153 and (iv) there is an explicit limitations period within which an action must be brought. 154

In short, the legislative branch crafted a clearly defined civil liability statute which expresses the policies of the United States government with regard to individual liability for "torture" or "extrajudicial killing" committed by a foreign official or an agent of a foreign government. The right to relief is matched against both the competence of a foreign government to regulate the behavior of its officials and agents—including the functioning of its own judiciary—and the practical limitations of U.S. courts to evaluate evidence of extraterritorial conduct. The political branches of the United States government are thus directly answerable for the correctness or otherwise of the policy choices clearly evident in the law.

The same is similarly the case under the so-called "antiterrorism" exception to sovereign immunity. 155 The law applies only where a United States national is a victim of the terrorist act, and it is thus readily reconcilable with the standard international law principle that injury to a national is a legitimate ground for regulating conduct that takes place outside a country's territorial boundaries. Moreover, here again, the law makes a clear ef-

152. 28 U.S.C. § 1350 n.3. Notably, both terms are expressly defined, thereby circumscribing their freewheeling judicial construction. "Extrajudicial Killing" is defined as: a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation. While "torture," in pertinent part, is defined as: any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind . . .

153. 28 U.S.C. § 1350 n.2(b).

154. Id.

fort at balancing the various domestic and foreign interests at

Second, there is in U.S. domestic law a judicially created excep-
tion to the presumption of sovereign immunity where the named
defendant is not the state *eo nomine*, but an officer of the state,
and where the relief sought is "injunctive" and "prospective".\textsuperscript{157} But the exception exists as an amelioration of the effects of the
very expansive judicially-crafted gloss on the Eleventh Amend-
ment of the United States Constitution which bars suits against
domestic states of the United States.\textsuperscript{158} The classic justifications of
the exception are thus rooted in the nature of the relationship
within a federal state of the central government and subsidiary
state entities; particularly in the idea of a supreme law that regu-
lates, in addition to the acts of individuals, the official conduct of
agents of the subsidiary state. Thus, sovereign immunity is said
not to extend to conduct deemed *ultra vires* either because the
conduct, though authorized by the subsidiary state, nonetheless
contravenes the superior constitutional command of the federal
government, or because the agent misconstrued the authority un-
der which he was acting.\textsuperscript{159} This exception is thus wholly inap-
sosite to the immunity considerations presented when officials of
foreign states are sued in United States domestic courts.

Although the ATCA actions may be nominally against govern-
ment officials, rather than against the state *qua* the state,\textsuperscript{160} reliance on this domestic-law-crafted exception to sovereign immunity
is misplaced. It may be romantically appealing to view "interna-

\textsuperscript{156} See, e.g., Flatow v. Iran, 999 F. Supp. 1, 12 (D.D.C. 1998) (discussing the legislative
history of the "Flatow Amendment").

\textsuperscript{157} See, e.g., Ex parte Young, 209 U.S. 123 (1908); Edelman v. Jordan, 415 U.S. 651
(1974).

\textsuperscript{158} See, e.g., Hans v. Louisiana, 134 U.S. 1 (1890); Monaco v. Mississippi, 292 U.S. 313
(1934).

\textsuperscript{159} See, e.g., Ex parte Young, 209 U.S. 123; Larson v. Domestic and Foreign Com-
merce Corp., 337 U.S. 682 (1949). But see Pennhurst State School and Hospital v. Hal-

\textsuperscript{160} Compare Filartiga, 630 F.2d 832 (suit against former senior police officer in Par-
aguay maintainable); Xuncax v. Gramajo, 886 F.Supp. 162 (D.Mass. 1995) (former Guata-
malan defense general); Paul v. Avril, 901 F.Supp. 330 (S.D.Fla. 1994) (former Haitian
head-of-state); Lafontant v. Aristide, 844 F.Supp. 128 (E.D.N.Y. 1994) (former head-of-
state), with Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (action not main-
tainable where claimed wrongful act received attention and approval of the President, the
Secretary of State, the Secretary of Defense, and the Director of the Central Intelligence
Agency of the United States); Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C.
Cir. 1994) (ATCA suit not maintainable against present German government for Nazi era
atrocities).
tional law" or "the law of nations" as a superior constitutional command violation of which puts a national government official in much the same light as the defendant in Ex parte Young. However, as a practical and jurisprudential matter, the analogy is fundamentally flawed. As demonstrated above, customary international law is too amorphous and lacks the authoritative finality for it to be meaningfully equated with the Constitution of the United States.\textsuperscript{161} The idea that the act of a foreign official is thus \textit{ultra vires} and subject to the withdrawal of the cloak of immunity thus lacks even that thinnest of veils which has sustained the Ex parte Young fiction.\textsuperscript{162}

Finally, proponents of the ATCA sometimes liken the treatment of immunity claims under the ATCA to those under Section 1983 of Title 42 of the United States Code.\textsuperscript{163} Section 1983, which makes "every person ... act[ing] under color of law" subject to suit where such act is in violation of federal law, has become in the last twenty years—and despite its mid-nineteenth century origins as a means of extirpating the remnants of the bondage of slavery—a preferred tool for the vindication of civil rights claims that challenge such governmental brutalities as excessive use of force in policing. While the statute does not expressly provide for immunity, the United States Supreme Court has read it to embody the concept under certain circumstances. Thus, a state and certain of its officials when performing specified duties—such as those intimately involved with the prosecution of offenses—are absolutely immunized from Section 1983 liability.\textsuperscript{164}

By contrast, a local government body is not.\textsuperscript{165} But even here, the liability of the local government body exists only where the claimed wrong was the product of a policy statement, ordinance,

\begin{footnotesize}
\begin{enumerate}
\item \textit{See supra} note 16 and accompanying text.
\item See, e.g., Kadic v. Karadzic, 70 F.3d 232, 244 (2d Cir. 1996) (stating that "[t]he "color of law" jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act" (citing Forti v. Suarez-Mason, 672 F.Supp. 1531, 1546 (N.D. Cal. 1987)), (reconsideration granted in part on other grounds) 694 F. Supp. 707 (N.D. Cal. 1988)). \textit{See also} Hilao v. Marcos, 25 F.3d 1467, 1476 (9th Cir. 1994) (citing Forti, 672 F.Supp. at 1531).
\end{enumerate}
\end{footnotesize}
regulation, or decision officially adopted and promulgated by the local government.\textsuperscript{166} Most critically, even in these situations, employees of local government bodies receive "qualified immunity" which depends on what they objectively reasonably believed the law authorized them to do.\textsuperscript{167} A balance is thus struck where a municipality is liable for the wrongful act of its employees, but only if it has expressly authorized such acts, and the employee is liable, but only if she could not reasonably have believed her conduct to be authorized by the law.\textsuperscript{168}

Under highly strained readings of the ATCA, holding foreign government officials liable for "torture" or for "disappearance" has been analogized to holding a municipal official liable under Section 1983 subject to her use of the qualified immunity defense.\textsuperscript{169} Preliminarily, this analogy faces substantial interpretive hurdles.\textsuperscript{170} If the approach to the construction of Section 1983 by the Supreme Court of the United States teaches anything, it is the central role of the legislative history of the statute,\textsuperscript{171} buttressed by the common law jurisprudence extant at the time of its passage.\textsuperscript{172} Neither consideration supports a reading of the ATCA that would abrogate the presumptive immunity of foreign government officials; whether those officials are viewed as acting outside the scope of their authority or in violation of "international law."

The legislative history of the ATCA, as other commentators have noted, is at best enigmatic.\textsuperscript{173} It certainly does not indicate

\textsuperscript{166} See Monell, 436 U.S. at 690; Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986).
\textsuperscript{169} See, e.g., Hila\textsuperscript{o} v. Marcos, 25 F.3d 1467 (9th Cir. 1994); Forti v. Suarez-Mason, 672 F.Supp. 1531, 1546 (N.D. Cal. 1987).
\textsuperscript{170} The interpretive problems are both textual and historical. As a textual matter, proponents need to explain why the phrase "person" as used in §1983 can in any sense be applied to an official of a foreign government. As a historical matter, much of the interpretation of §1983 is bound-up with the history of that enactment; more specifically, the history of slavery and of the legislated subordination of the black population in antebellum United States. That history has been essential in the interpretation of Section 1983, and analogies drawn from §1983 must be construed in light of that past history. Compare Monroe v. Pape, 365 U.S. 167 (1961), with Monell, 436 U.S. 658, which rely on the same legislative history to reach essentially opposite conclusions on the liability of municipal bodies under § 1983.
\textsuperscript{173} See supra notes 88-90 and accompanying text.
any appreciation by the 1789 Congress of the United States that foreign officials—regardless of the source of their authority—be made amenable to lawsuits in the United States. What history exists indicates quite the contrary; that the ATCA was enacted for the protection of such foreign officials.\textsuperscript{174} Nor does the legislative history of Section 1983 and the prevalent common law practice in the immediate post-civil war United States in any way indicate a desire by the United States Congress to subject foreign officials to lawsuits in the courts of the United States for violations of international law. As cases in admittedly different circumstances make clear, the absolute immunity from suits challenging sovereign conduct was the norm.\textsuperscript{175}

Yet, the invocation of Section 1983 as an analog in ATCA suits is instructive, but in an ironic manner. It suggests a parochial conception of the structure of international law that would be untenable even as a statement of the law of sovereignty within the federal structure of the United States, let alone in dealings with the much more multicultural societies that constitute the "international community." That conception seemingly deems the relationship of foreign states to U.S. domestic institutions as no different from those of local communities and their servants to the United States. More particularly, it seems to view foreign sovereigns and their officials as subject to the same fealty to the United States that is prescribed in Article VI of the United States Constitution.\textsuperscript{176} But this is not only unwarranted by legal doctrine, but more fundamentally, it must be asked whether this is a wise view

\textsuperscript{174} See, e.g., Burley, supra note 11.
\textsuperscript{175} See, e.g., Hans v. Louisiana, 134 U.S. 1 (1890); Underhill v. Hernandez, 168 U.S. 250 (1897). The "absolute" immunity of foreign states from lawsuits instituted in the United States dated as far back as the venerable case of The Schooner Exchange v. McPadden, 11 U.S. 116 (1812).
\textsuperscript{176} The United States Constitution provides that the Constitution, laws and treaties made under it shall be the "supreme law" of the land. U.S. CONST. art. VI. The extent to which international legal doctrines constrain United States persons and entities is a fertile field of inquiry in the U.S. Suffice it to say that Americans take quite seriously that any obligation that is not consistent with the United States Constitution cannot regulate the behavior of the United States nor of persons subject to the jurisdiction of the United States. That point has been brought dramatically to light in the recent execution by the State of Virginia of Angel Breard, a Paraguayan citizen that indisputably was denied a right he possessed under international law, notwithstanding an interim order of the International Court of Justice specifically mandating that his pending execution be stayed. For the United States Supreme Court, Mr. Breard's international law claims could—and were disposed off—solely in terms of the procedures available to him under United States law. See Breard v. Green, 118 S.Ct. 1352 (1998) (per curiam).
of the relationship of foreign states to the United States, even in a
global community with a single "indispensable" superpower.177

The remainder of this essay departs from the all-too-familiar
metronome of gauging the appropriate reach of the ATCA by re-
ference to U.S. domestic law and practice, and instead asks what
constraints, if any, the existence of the United States as one, but
only one (albeit the primus inter pares) of a recognizable com-
nunity of nation states places on the construction that should be
given to the ATCA by its judiciary, particularly in light of the ex-
pressed claim by the judiciary that the ATCA incorporates "inter-
national law." The following sections thus go beyond the well-
rehearsed rhetoric of whether "customary international law" is or
is not "part of U.S. law." They inquire into the extent to which the
U.S. judiciary's rejection of the "extraterritoriality" doctrine in
ATCA cases and its construction of customary international law as
authorizing it to review and pass on the conduct of foreign gov-
government officials vis-a-vis foreign nationals faithfully take account

177. It has become fashionable among U.S. foreign policy makers—including the Presi-
dent, the Secretary of State and its Permanent Representative to the United Nations—to
assert not only the obvious fact that the United States is the "sole" superpower, but also
that it is an "indispensable nation." See, e.g., Morton Kondracke, Clinton Develops His
Strategy in Foreign Policy, SACRAMENTO BEE, July 8, 1997, at B7, (stating that "[c]learly,
Clinton thinks that the United States is the world's lone superpower, the indispensable
nation without which nothing useful can be achieved. Some Clinton aides say that, de
facto, the world lives under a Pax Americana and that Clinton wants to keep it that
way."); Georgie Anne Geyer, Passivity Doesn't Fit Superpower, DENV. POST, April 11,
1997, at B7 (stating that "the 'only superpower' and the 'indispensable nation,' [are] the
terms that President Clinton has picked up from Secretary of State Madeleine Albright");
Paul Bedard, U.S. Won't Let Russia Slow NATO Growth, WASH. TIMES, March 19, 1997,
at A1 (stating that "Mrs. Albright said Russian approval isn't needed and doesn't matter
because the United States is the sole remaining superpower. 'We are the indispensable
nation,' she said"); Judy Peres, On the Record—Bill Richardson, CHI. TRIB., Dec. 21,
1998, at 3A ("we are the indispensable nation, the lone superpower; so most countries still
turn to us for leadership"). Cf. Charles William Maynes, The Perils of (and for) an Impe-
rial America, FOREIGN POL'Y, Summer, 1998, at 1 (stating that "[i]n their public discourse,
Americans have come to the point where it is hard to find a foreign policy address by any
prominent figure in either party that does not make constant reference to the United
States as the indispensable nation, the sole superpower, the uniquely responsible state, or
the lone conscience of the world"); William Pfaff, U.S. Policy on U.N. Court Gives Tacit
Approval to Lawlessness, BALTIMORE SUN, Aug. 12, 1998, at 15A (stating that "[t]he case
made by the [Clinton] administration [for preferential treatment of United States citizens
under the statute of the International Criminal Court] was that because the United States
is the sole superpower and the "indispensable nation," which others expect to uphold interna-
tional order, it may sometimes find it necessary to violate international law"). Such un-
tamed hubris, as I shall suggest, is directly related to the approach the courts have taken in
construing the ATCA to apply to events with no connection to the U.S. other than the fil-
ing of a lawsuit.
of the genuine communal interests implicated in the idea of an "international community."

V. INTERNATIONAL LAW AND THE EXTRATERRITORIAL JURISDICTION OF NATIONAL COURTS

The extent to which international law places limits on the extraterritorial reach of national courts, and the obligation of those courts to respect those limits is a basic and much-discussed question among international law scholars.178 Yet, it is one for which there is no straightforward and universally respected answer, and international jurists are a good deal more circumspect in their pronouncements than are scholars.179

Of course, to the extent that a country is a signatory to a treaty which regulates the extraterritorial reach of its courts, then under ordinary principles of international law, it is bound to honor the terms of that treaty.180 The United States, like the vast majority of states, has subscribed to no over-arching treaty that defines the

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178. A commonplace distinction is often made between "prescriptive" and "adjudicatory" jurisdiction. The former is said to relate to the power of a legislature to prescribe the rules of decision over the subject matter of an action, while the latter purportedly deals with the power of a judicial tribunal to assert jurisdiction over the person or thing before the court. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES §§ 401-416 (Prescriptive Jurisdiction), and §§ 421-423 (Adjudicatory Jurisdiction). For the purposes of the discussion that follows, this is a distinction without a difference; the power of a court to assert jurisdiction over a person or thing found outside of the national territory is no more or less an incident of national authority than is its power to adjudicate a claim which arises from occurrences outside of the national territory. In either case, the validity of the assertion of judicial power is either authorized by law, or it is not, and the source of that law is no less likely to be national or international, treaty or customary in one case rather than the other. Indeed, in the United States, so-called "adjudicatory jurisdiction" is as much dependent on legislative enactments (the so-called "long arm statutes") as are the sources of rights giving rise to substantive claims.

179. The generally accepted leading case is the S.S. Lotus.

180. Perhaps the most notable of international treaties regulating the transnational jurisdiction of domestic courts are those involving the members of the European Union and the European Free Trade Area. See CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, 1990 O.J. (C 189) reprinted in 29 I.L.M. 1413 (1990) [hereinafter BRUSSELS CONVENTION]; CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, Sept. 16, 1988, 1988 O.J. (L. 319) [hereinafter LUGANO CONVENTION]. These treaties go beyond providing "reciprocity" among national courts in the treatment of jurisdictional issues and instead, in the words of one commentator, "view the courts of the different Member States as a single judicial system... [with] the jurisdictional rules distribut[ing] the lawsuits between these 'European courts' because the same rules apply in all Member States. See Markus Lenenbach, ANTI-SUIT INJUNCTIONS IN ENGLAND, GERMANY AND THE UNITED STATES: THEIR TREATMENT UNDER EUROPEAN CIVIL PROCEDURE AND THE HAGUE CONVENTION, 20 LOY. L.A. INT'L & COMP. L.J. 257, 307 (1998).
reach of its courts in the adjudication of events occurring outside of its borders. Rather, its courts, emphasizing the need for judicial discretion, have adopted a case-by-case approach with guiding principles derived from the ad hoc application of such highly malleable concepts as "reciprocity"\textsuperscript{181} and "comity."\textsuperscript{182} Moreover, even in those few instances where some of its bilateral (e.g., the so-called "Friendship, Commerce and Navigation")\textsuperscript{183} and multilateral (e.g., the "Hague" Conventions on the "taking of evidence" and "Service of Process Abroad")\textsuperscript{184} treaties may be read as impliedly circumscribing the extraterritorial reach of its courts, the Supreme Court of the United States has held that domestic interpretive methodologies rather than international concepts should be resorted to for giving effect to such treaties.\textsuperscript{185} In the absence of an explicit treaty undertaking, then, the most charitable reading of the authority of a national court to assert jurisdiction over events occurring outside of the national territory is to be based on the quite fluid notion of "customary international law."\textsuperscript{186}

But, as previously suggested, few commentaries on the \textit{Filartiga} Proposition focus on the international jurisdicitional competence of U.S. domestic courts to entertain these actions.\textsuperscript{187} Rather, the primary concern of U.S. commentators (and seemingly the extent of

\textsuperscript{181} See Hilton v. Guyot, 159 U.S. 113, 166 (1895).


\textsuperscript{183} These treaties (sometimes referred to as "amity and economic relations" agreements) were direct products of the treaty-making approach adopted by the United States at the onset of the "cold war" as a means of countering or "containing" the influence of Soviet Russia. In more recent years, they have been replaced by "bilateral investment treaties" ("bits") which are more narrowly focused on trade and investment issues. Cf. Kalamazoo Spice Extraction Co. v. Ethiopia, 729 F.2d 422 (6th Cir. 1984) (appendix).


\textsuperscript{186} See supra Part II.

\textsuperscript{187} See supra notes 106-108 and accompanying text.
the jurisdictional inquiry they deem appropriate) is whether U.S. internal law authorizes the assertion of the claimed jurisdiction. Implicit in this focus is that international law is relevant only to the extent that it is incorporated in U.S. domestic law. While U.S. lawyers generally agree (although not without substantial dissent) that U.S. domestic law encompasses the substantive contents of "customary international law,\(^{188}\) they have not indicated that U.S. domestic law also encompasses international norms on national prescriptive jurisdiction. Indeed, the assessment of jurisdictional standards has been based entirely on U.S. domestic legal standards.\(^{189}\) The courts have thus focused on the scope of Congressional grant of jurisdiction,\(^{190}\) U.S. constitutional limits on that grant,\(^{191}\) and possible common law constraints.\(^{192}\)

And yet, this exclusive focus on domestic law as the basis for jurisdictional authority, while it may be deplored by an internationalist, is perfectly rational and entirely consistent—if not inherent—in the nature, character and structure of international law. Despite the desire to present customary international law within the idealized framework of objective standards that function to do justice with little regard to the status of the parties, and whose authority is independent of the contemporaneous assent of the defendant, the reality is that unlike domestic law, international law is entirely based on consent. And at its core, this is no less true of customary international law than it is of treaty-based international law.\(^{193}\) By contrast, the assertion of jurisdiction by a domestic court is essentially fiat-based. It is not, and cannot be based on the *ad hoc* consent or withdrawal of consent by the parties.\(^{194}\) International law,

188. *See*, e.g., the commentaries cited *supra* notes 84-88.
189. *See id.* and accompanying text.
190. *See supra* notes 30-33, 76-75 and accompanying texts.
191. *See supra* note 39 and accompanying text.
192. One such common law constraint deals with whether a claim or "cause of action" should be viewed as "local" (such as in matters dealing with title to land, and the enforcement of taxation, revenue raising and penal rules), or "transitory," generally associated with personal actions for a tort or breach of a contract). The *Filartiga* court makes much of this distinction, but its apparent limitation of the doctrine to the land/tort classification is far too doctrinally rigid and it is inconsistent with the court's methodology elsewhere in that opinion of updating past doctrine in light of the spirit of the law. 630 F.2d at 885. *See also supra* note 90 and accompanying text.
194. In this respect, U.S. courts sometimes distinguish between the authoritative basis for "personal jurisdiction" and that for "subject matter" jurisdiction by suggesting that the former, being "personal," is waivable, while the latter, a "sovereign" prerogative, is not. *See, e.g.*, Insurance Co. of Ireland v. Campagnie Des Bauxites De Guinee, 456 U.S. 694, 701-02 & n.10 (1982). The claim is highly debatable. *Id.* at 710 (Powell, J., concurring in...
lacking the compelling dictate of a sovereign, is unable to provide the authority for a domestic court to assert jurisdiction even over claims that arise under substantive international law.

A frequent device for coping with the absence of a sovereign authority in international law is its "incorporation" into domestic law. The methods for doing so, the scope of the incorporation and the rhetoric of its justification vary; but in all cases, international law operates within the national judiciary not of its own force, but as filtered through municipal legal authorization. Whether this is done through an overarching "basic" or "constitutional" law as in the Federal Republic of Germany and the Republic of South Africa,\textsuperscript{195} or through specific legislative enactments as in the United Kingdom,\textsuperscript{196} or through common law-type judicial construction as

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part). For the purposes of this article, however, the distinction is not relevant; for whatever else may be involved in the distinction, the claim of jurisdiction at stake in this article embraces that of "subject matter" jurisdiction, and is addressed, therefore, at least to the question of national sovereignty.


\textsuperscript{196} Thus, in Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet (House of Lords, Nov. 25, 1998), all of the law lords agreed that whether Augusto Pinochet should be extradited to Spain depended not on any universalist construction of "customary international law," but the extent to which the United Kingdom’s ratification of the Torture Convention and the Vienna Convention on diplomatic immunities had altered the English common law practice of according immunity to former heads-of-state. In other words, they were interpreting English statutory law—albeit one that may incorporate international customary norms, if that was the intention of the legislation—not "international law" operating of its own force. This point was even more emphatically made in the second House of Lords Pinochet decision, where the Law Lords decided that Senator Pinochet could be extradited under English law only for those acts which English law would have recognized as violative of the torture convention on the date the Convention went into force in the U.K. \textit{See Ex parte} Pinochet Ugarte (No. 2), 2 All E.R. 97 (1999). \textit{See also} In re International in Council, (House of Lords, Lord Templeman, Oct. 26, 1989) (stating that “[t]he courts of the United Kingdom have no power to enforce at the behest of any sovereign state or at the behest of any individual citizen of any sovereign state rights granted by treaty or obligations imposed in respect of a treaty by
in the United States, the essence is that international law operates within domestic courts "as a matter of [national] grace," not as a matter of international compulsion. There is simply no authority in international law absent specific agreement for the courts of a country to entertain actions—or for that matter, to forego entertaining actions—on the ground that a putative defendant has engaged in conduct that violates international law. The dispositive rules are generated entirely from within the domestic system.

But if the anarchical international community is not also to be a lawless one, the self-regulating states must follow some intelligible principle that reflects more than their own narrow short term self-interest. International law may not command some specific doctrine of extraterritoriality or of comity, but it points towards some principled features which would further the rule of law in the international community.

Conceptions of jurisdiction wrestle with two forces that, not infrequently, pull in quite opposite directions. At the heart of all judicial proceedings is some conception of "procedural fairness" that derives not from a generalized conception of justice in the abstract, but in the just resolution of the particular matter before the adjudicating tribunal. Central to procedural justice is that the litigant be heard (or at least be given the opportunity to be heard); for whatever preconceptions one may have as to the desert of those in the litigant's position, there remains the possibility that the particular litigant can stake a meritorious claim to be treated differ-
ently. This belief in individualized justice has had to confront an equally core conception of law as the expression of a community's sense of itself; its moral, social and political values. This is no less true today than it was in the pre-modern age. In the latter period, the monarch's decree (like state fiat today) was the embodiment not only of the sovereign's power, but of the community's sense of justice as well. While the national within the territory was thus subject to the laws of the land, neither the national outside of the territory, nor the foreigner within the territory was thought legitimately to fall within that law; at least in its unmodified form. The fullest scope of the state's power to regulate therefore existed with regard to conduct within the state by a national of the state.

With increasingly rapid changes in communication and transportation technologies, territoriality seemed inadequate to the task. The need to maintain peace and security within a sovereign's fiefdom led the kings of England to assert the jurisdiction of the King's Court over any complaint that arose within the territorial limits of the kingdom, regardless of the nationality of the wrongdoer. But even here, special measures were taken to respect the differences of a foreign national.

The nineteenth and twentieth centuries, however, have been the era of nationalism. In the United States, the assertion of sovereign power was made coextensive with national citizenship, regardless of where the conduct occurred. The colonizing processes of European powers, and the post-colonial moments of the developing countries of Africa and Asia readily embraced the legitimization of the legal order in terms of "national sovereignty."
While the initial impulse was to assert jurisdiction over a national's conduct occurring outside of the state, the justification of "protective jurisdiction" which provided the rationale for such extraterritorial assertion of jurisdiction was equally serviceable for situations which did not involve nationals, but had some "effect" within the sovereign's territory.\footnote{207} The theory of "protective jurisdiction" was thus deployed to justify the extraterritorial assertion of jurisdiction in instances where the "interest" of the state was at stake. But since interests can be articulated with infinite elasticity, did this effectively imply that there was no limit to extraterritorial jurisdiction?

The response of the United States is that the individual judge ought to make that decision by balancing several factors including the nationalities of the parties, the nature of the effects of the alleged wrongful conduct on the various states, the policy concerns of the state that seeks to assert jurisdiction, and the interests of the "international system" in having that state assert jurisdiction.\footnote{208} This "balancing" approach to determining when the assertion of extraterritorial jurisdiction is appropriate, although submitted by United States scholars as a "principle of international law,"\footnote{209} has not been accepted by other societies. Rather, those societies, even when they accept the principle of "protective jurisdiction," prefer the less amorphous "bright-line test" under which a state may assert jurisdiction only for conduct occurring within the state, or by a national of the state, or for the effects of conduct expressly directed against the state, or against nationals of that state.\footnote{210}

\begin{footnotes}

\footnote{208}{See generally, United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). The slimness of the line-drawing between "effects" and "conduct" within a state, and conduct by nationals versus that by foreigners—particularly in a "globalized" and multinational corporate environment—are illustrated by such cases as the Wood Pulp case. See In re Wood Pulp Cartel: A. Ahlstrom Oy and Others v. E.C. Commission, 1988 E.C.J. 4 C.M.L.R. 901 (1988). For much earlier but similar efforts at line-drawing in the United States, see Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).}

\footnote{209}{See generally, supra note 112, §§ 402-403.}

\footnote{210}{See, e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798-99 (1993) (asserting jurisdiction over conduct that occurred outside of the United States because U.S. legislation permitted such assertion of jurisdiction as an incident to the protection of U.S. domes-}
Neither conception of international law, however, fairly embraces the *Filartiga* Proposition. The alleged wrongful conduct in question occurs well outside the territory of the adjudicating court, and usually does not affect the national or any generally recognized interest of the adjudicating state. What international law doctrine then, justifies the assertion of jurisdiction over these cases by United States courts? Two possibilities exist: the first is the so-called principle of "universal jurisdiction," and the second would be the seemingly remarkable proposition that in the anarchical society that is the international community, the national assertion of power is its own justification.

At the core of modern international law—and certainly central to the principle of extraterritoriality thus far discussed—is the idea of the dual composition of the sovereignty of the state. Each state-member of the international community is vested with sovereignty which (1) legitimizes its plenary and exclusive regulatory control over a specified territory; and (2) thereby necessarily ousts all other states of the capacity to regulate events within its territorial limits—at least absent the consent of the state.211 As previously explained, the "effects" or "protective jurisdiction" doctrine may be reconciled with this core concept on the ground that the extraterritorial effect of a wrongful act is itself in violation of the territorial exclusivity of the suffering state, and that the assertion of ex-

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territorial jurisdiction is thus simply self-help that restores the \textit{status quo}.

The idea of "universal jurisdiction" presents a quite different conception of international law. Proponents of "universal jurisdiction" contend that there are certain activities that are essentially "international" in character, and thus may be regulated either by "international law," or by other states even when such activities occur entirely within the territory of a foreign state.\footnote{212} Of course, to the extent that the "international law" is a treaty or convention assented to by a state, then the doctrine of "universal jurisdiction" can be made to fit within traditional international legal doctrine.\footnote{213} It is when such "law" is derived from such doctrines as "the obligatory norm of \textit{jus cogens},"\footnote{214} or fashioned whole-cloth by the domestic courts of a country purportedly as "customary international law,"\footnote{215} that it severely undermines the very fundamental principle of international law from which it purports to take its reference.

There are certainly substantive norms in international law with which all persons—states and individuals alike—should strive to comply, and to do so without regard to whether they have consented, expressed or otherwise. It may even be that such compliance can be compelled through adjudication such as by the International Court of Justice, an international criminal court, or some other \textit{ad hoc} international institution. In all of these instances, the


213. This, for example, is the case with the recently adopted Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. No. A/CONF. 183/9, \textit{reprinted in} 37 I.L.M. 999 [hereinafter Rome Statute]. Notably, the Statute of the Court makes plain that it is to function as a "complement" to national courts, and it limits the subject matter jurisdiction of the court to three reasonably well-defined categories of cases: genocide, crimes against humanity and war crimes, and a fourth (aggression) which is to be enforced only if it has been statutorily defined. \textit{See} arts. 5(a), (2). Thus, while one may interrogate on its merits the propriety of such an international convention, there is no doubt that it fits squarely within accepted international legal practice.

214. \textit{See}, e.g., Hilao v. Marcos, 103 F.3d 789, 794 (9th Cir. 1996); \textit{id.} at 767, 778. \textit{But see} Smith v. Libyan Arab Jamahiriya, 101 F.3d 239, 242-45 (2d Cir. 1996) (remarking that "[t]he contention that a foreign state should be deemed to have forfeited its sovereign immunity whenever it engages in conduct that violates fundamental humanitarian standards is an appealing one," but that contention is subject to analysis under the Foreign Sovereign Immunities Act).

215. \textit{See supra} Part III (discussing the creation of the "Filartiga Proposition").}
abrogation of sovereignty entailed by the adjudication has either been consented to,\textsuperscript{216} or has been forced on an unconsenting party as a result of the collective power or wisdom of the diverse members of the international community.\textsuperscript{217} Such representative accountability is missing, however, where one state arrogates to its domestic courts the unreviewable decision to hold another state or its nationals responsible for violations of "international law" occurring outside of the territory of the first state. This lack of accountability exists regardless of whether the claimed basis for the jurisdiction is "universal" or not. There is, in essence, no check on the arbitrariness with which the exercise of power that is inherent in the assertion of jurisdiction can thus be deployed. It is precisely that concern with the arbitrariness of the outsider that renders the idea of sovereignty a necessary legal concept in international law.

VI. HUMAN RIGHTS ADJUDICATION AND EXTRATERRITORIALITY

The manifestation of international concern over the human rights of individuals and subordinated groups within national boundaries has been a seminal development in international law during the last quarter of the twentieth century. While there continues to be disagreement over the scope and sources of international human rights law,\textsuperscript{218} the arguments presented in this section accept as a basic proposition that the deprivation of some rights to an individual or a group, when engaged in by a government, its officials or agents, and conducted entirely within the territory of the state, may nonetheless violate international law.\textsuperscript{219} Moreover, to avoid clouding the arguments, this section of the essay does not challenge the substantive components or elements that constitute the violation of the relevant international law. The inquiry undertaken here is the extent to which, assuming such a violation to be

\textsuperscript{216} See, e.g., The Statute of the International Court of Justice, art. 36, June 26, 1945, 993 U.S.T. 730, 1 U.N.T.S. 16. Similarly, the negotiation of an "International Criminal Court" entails the giving of consent to the jurisdiction of that court by the signatory states.


\textsuperscript{218} See supra notes 33-36 and accompanying text.

\textsuperscript{219} Cf., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702.
provable, it is "lawful" and "reasonable" for the domestic courts of a nonperpetrating country to adjudicate such claimed violations of international human rights. In other words, this section explores the jurisdictional limits on unilateral adjudication by the nonperpetrating state.

Purported justifications under international law for the extraterritorial assertion of jurisdiction in human rights cases fall into three related categories—one doctrinally positivist, and the other two functional or prudential. These are: the applicability of the doctrine of universal jurisdiction; that human rights is different; and that in the absence of extraterritorial jurisdiction, the wrongful conduct will go unpunished, rendering deference ineffectual. These may be referred to as the "universality," "difference" and "impunity" justifications, respectively.

A. Universality, Difference and Impunity Considered

Although the claim is frequently made that international human rights norms constitute "jus cogens" that are enforceable in domestic courts, rarely are explanations offered for this assertion. That a norm constitutes "jus cogens" certainly does not automatically imply its enforceability through a civil proceeding in the domestic courts of any country. Jus cogens, it is said, are "peremptory norms" in international law. It is, however, one thing to say that an individual or a state is bound by a norm, but quite another to assert that the norm can be enforced by the independent and unilateral act of any state; even where that state under its own domestic laws arrogates to itself the jurisdiction to enforce "international law." The competence to enforce through adjudication even

220. Id. at § 402.
221. Id. at § 403.
222. See supra note 213. The one effort that undertakes an extended analytical defense of the proposition is Adam C. Belsky et al., Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law, 77 CAL. L.REV. 365 (1989) (arguing that conformance to certain fundamental principles by all states is absolutely essential to the survival of the international community, and that a non-conforming state thereby loses the right to be a state, and may be prosecuted as a pariah by the courts of civilized states.)
223. For those to whom this point seems unnecessarily legalistic, compare it to issues raised by unilateral intervention under Art. 2(4) of the U.N. Charter. International law clearly prohibits "wars of aggression." Yet, this "peremptory norm" does not authorize any member state unilaterally to intervene in a conflict simply because it judges one of the combatants to be engaged in a "war of aggression". But see ROME STATUTE, supra note 213, at art. 5(1)(d), which authorizes that court to adjudicate "the Crime of Aggression," although the definition is yet to be provided.
those peremptory norms of international law derive neither from their classification as "jus cogens" (a classification that is often more rhetorical than jurisprudential),\(^{224}\) nor from the substantive content of the norms that are so described. Rather, the power to enforce *jus cogens* must be found in those rules and principles that regulate the jurisdictional competence of the court. For reasons already discussed, where the claim is based solely on the violation of international law, and not on the nexus of the violation and the territory of the enforcing state,\(^{225}\) national law is an inadequate source of such jurisdictional law. Under international law, the sole basis for the extraterritorial assertion of such jurisdiction would be under the "universality" doctrine.

Strictly as a doctrinal matter, universal jurisdiction is inapposite to extraterritorially-based civil claims such as those at issue in *Filartiga*-type actions. The doctrine is generally accepted as applicable to criminal prosecutions for violation of a handful of norms that have gained general acceptance as *jus cogens*.\(^{226}\) In its traditional formulation, universal jurisdiction applied in criminal prosecutions for piracy, and the slave-trade, and more recently in trials by international tribunals of "war crimes." But even in its emerging and much more loosely framed current academic statements that advocate the expansion of its scope to embrace prosecutions for air-piracy, hi-jacking, hostage-taking, torture, apartheid, genocide and other so-called "crimes against humanity," it continues to retain its moorings in criminal law; that is, as a publicly instigated and publicly controlled action to vindicate the public interest. Indeed, the rationale for universal jurisdiction can hardly support

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224. See, e.g., Alejandre v. Republic of Cuba, 696 F. Supp. 1239, 1252 (D.D.C. 1988) (stating that "[t]he fact that the killings were premeditated and intentional, outside of Cuban territory, wholly disproportionate, and executed without warning or process makes this act unique in its brazen flouting of international norms. There appears to be no precedent for a military aircraft intentionally shooting down an unarmed, civilian plane"). One wonders if former President Reagan would agree with this last assertion in view of his claims about the shooting down of Korean Airline Flight 007 by the Soviet air force, or whether the Iranians would find acceptable the apparent limitation of "jus cogens" norms to shoot-downs by "military aircraft" rather than "military naval cruisers." Undoubtedly, the rather vague definition of *jus cogens* as "principles and rules concerning the basic rights of the human person" (see *Barcelona Traction*, 1970 I.C.J. at 32) renders the reading plausible, but was the United States also in violation of *jus cogens* when it shot down an Iranian civilian aircraft with an even greater loss of life, or does the interpretation of *jus cogens* demand a more nuanced and principled construction?

225. See supra notes 207-09 and accompanying text (addressing the doctrinal bases of nationality, territoriality and effects-based jurisdiction.)

any other approach. Its exception from the requirement that a territoriality or nationality nexus exist as a prerequisite to the exercise of jurisdiction is grounded on the view that the crimes being prosecuted are of such a nature that the perpetrator is hostis humani generis (i.e. an enemy to all of mankind).227 Growing out of the effort to suppress piracy and the slave-trade on the high-seas, the exception was readily explained by the practical reality that pirates and slavers—at least in the eighteenth and early nineteenth centuries—were engaged not simply in conduct about which there was universal disapprobation, but did so by exploiting the high seas which were beyond the control of any individual government. Universalizing the punishment of such lawlessness was essential because without it, there would always be refuge for the law-breaker. Moreover, by criminalizing rather than civilianizing the punishment, the prosecuting state was bound to account to other state members of the international community for its treatment of the alleged hostis humani generis.228 Perhaps most significantly, the law-breakers themselves either were not nationals of an acknowledged member-state of the international legal system—in the case of the trans-Atlantic slave-trade, they were acting in direct contravention of the undertakings of their national states.

Contemporary claims of universal jurisdiction in the criminal punishment of war-crimes, air-piracy by stateless persons, or perhaps even of "apartheid" can be reconciled with these origins and justifications of universal jurisdiction.230 In these cases, the absence of a functioning government answerable to the international community for the conduct of the wrongdoer may mean that, as a practical matter, effective law enforcement, if it is to be provided, must be either by an international tribunal,231 or by the national


228. Cf. The Antelope, 10 Wheaton (23 U.S.) 66 (1825). Although a libel action in admiralty, and therefore technically civil in character, the direct involvement of the United States government gave it much of the imprimatur of a criminal proceeding.

230. See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES, supra note 113, at §§ 423, 701-03. See also Theodor Meron, War Crimes Law Comes of Age, 92 Am. J. Int'l L. 462, 463-64, 468 (1998); Randall, supra note 226. Notably, the inclusion of apartheid in this list is entirely hypothetical and purely politically expedient. It is a sop that the West's elites gave to the Third World, and not a single practitioner of apartheid has ever been threatened with indictment (let alone actually prosecuted) under the doctrine.

government of a functioning state. In either case, universal jurisdiction exists entirely by virtue of “necessity.”

By contrast, the so-called international human rights claims brought in the civil courts of advanced Western industrial states fall far short of satisfying these prerequisites for claims of universal jurisdiction. The civil lawsuits are brought by private parties under legal theories whose sole concern—and properly so—is the vindication of private interests. As a mere bystander in such actions, the state neither authoritatively condemns the alleged wrongful conduct, nor does it vindicate the benefits to the international system that flow from a vigorous defense of jurisdictional doctrine. The result is both moral ambiguity and doctrinal confusion.

There are, of course, arguments for reinterpreting the doctrine of universal jurisdiction. The doctrinal development of the concept—essentially a creature of customary international law—is not (and should not be) frozen in time, and in particular, it should be expanded to include civil actions that arise from the violation of international human rights norms. This argument appears particularly strong where no superior alternative forum is immediately available to the civil claimants. Furthermore, in the absence of such an expansion, meritorious claims might go uncompensated, and wrongful conduct will go unpunished.

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232. See, e.g., In re G. Military Tribunal, Div. 1, Lausanne, Switzerland, April 18, 1997, summarized and discussed in Andreas R. Ziegler, International Decision, 92 AM. J. INT’L L. 78 (1998) (prosecution of Bosnian accused of violation of international humanitarian law under provision of Swiss law authorizing such prosecutions where such acts are committed during an “international armed conflict”).

233. See supra Part III.

234. See infra Part VI-B:

235. Cf. Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995) (“[a]lthough there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them.” (quoting “Statement of Interest of the United States” submitted in response to an invitation by the Court)).

236. See Randall, supra note 226.

237. Cf. Kadic v. Karadzic, 70 F.2d 232, 250 (2d Cir. 1995) (stating that “at this stage of the litigation no party has identified a more suitable forum, and we are aware of none. . . . It seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs’ claims”).

The obvious but far too simplistic counter to these arguments would be to debate their factual premises,\textsuperscript{239} or to assert that these shortcomings are inherent in any jurisprudence that allows jurisdictional bars to trump adjudication on the merits; and that in this regard international law is no different from domestic law. A more satisfying and jurisprudentially useful response demands exploration of the relationship of jurisdictional doctrines to the maintenance of an equitable international system.

B. \textit{Jurisdictional Limits, Pluralism and the International Community}

In the absence of clearly defined affirmative rules for the international regulation of extraterritorial jurisdiction in human rights cases, and given the obviously superior resources and material power of proponents of borderless jurisdiction, reliance on the standard presumption of nonextraterritorial reach—absent the requisite nexus—is clearly insufficient, both intellectually and practically. As an ultimate matter, the propriety of an international rule that permits or denies extraterritorial jurisdiction to domestic courts in international human rights cases must rest on the rationale for jurisdictional limits, and the extent to which that rationale can coexist with the effective enforcement of international human rights.

Because most jurisdictional rules are positivistic in character, and because at their core, rationalizing them is as slippery as is justifying power, jurists rarely undertake an inquiry into the underlying norms at stake. The one limited exception has been the effort of American jurists to rationalize the so-called "effects doctrine."\textsuperscript{240} But even here, no less an intellectually gifted jurist than Judge Learned Hand threw up his hands when he arrived at the question of the jurisprudential justification for the extraterritorial assertion of jurisdiction under international law.\textsuperscript{241} Rather, he resorted to the now-familiar argument among American scholars that once Congress, lawfully exercising its powers under the United States Constitution, has authorized the assertion of juris-

\textsuperscript{239} For example, despite the millions of dollars in judicial awards in ATCA claims, virtually none of them have resulted in actual compensation to the victims. Similarly, the claim that these adjudications contribute to the deterrence of human rights violations is at best hypothetical. There is to this writer's knowledge no evidence adduced to support it.

\textsuperscript{240} \textit{See supra} note 207.

\textsuperscript{241} \textit{See} United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
diction, that is the end of the inquiry.\textsuperscript{242} Nor does the invocation of a "balancing approach" by subsequent United States courts\textsuperscript{243} fill the intellectual void. These "pragmatic" tests are presented as positive interpretive statements of United States jurisdictional law, not as jurisprudential justifications under international law.

The normative issues implicated in jurisdictional questions can be avoided, however, only as long as the entrenched power structure remains unchallenged. One of the intellectual and jurisprudential benefits of the emerging challenge by international human rights law to the orthodox international legal regime is that it presents the opportunity for the articulation and appraisal of the competing norms that underlie their jurisdictional claims. Moreover, that inquiry can take place in the light of present needs, and with deference to custom only when it serves those needs.

Contemporary international human rights law, at least as typically advanced by Western scholars—has at its core two values that raise profound challenges to the conventional jurisdictional doctrines described earlier in this essay.\textsuperscript{244} These values are its commitment to "individual rights," and that such rights are "universal."\textsuperscript{245} By "individual rights," proponents advocate a norm of an unintermediated relationship between the legal rule and individual beneficiaries of the rule. The individual's possession of a right (or for that matter, assumption of an obligation) under international human rights law, is said to be "direct," as a result of her membership in the international community; not because of her relationship—or lack thereof—to an intermediate legal entity. Moreover, the norm is universal precisely because as the relationship is direct rather than virtual or representative, intermediate institutions are without capacity to interpret or translate its application to the individual. To suggest that the "right" may vary in space or time is derogatorily referred to as being "relativistic."

\textsuperscript{242} \textit{Id.}
\textsuperscript{243} \textit{See cases cited supra note 112. See also} RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES, \textit{supra} note 113, at §§ 402-403.
\textsuperscript{244} \textit{See supra Part V.}
\textsuperscript{245} \textit{See generally} LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES (1995).
Thus, we have a "global community" of uniformly rights-endowed individuals who are entitled to the protection of "international human rights law." 246

This contrasts vividly with the definition of "rights" under international law in the nineteenth and early twentieth centuries. The nation state, it was frequently repeated, was both the object and subject of international law. International law acted (or regulated) solely the rights and responsibilities of those nation states. The rights and responsibilities that accrued to the individual were derivative of her relationship to the nation state. 247

The jurisdictional implications of these divergent normative conceptions of the relationship of international law to its actors is straightforward enough, and if international law was either solely a matter of abstract philosophical engagement, or of pure practical power, not much more would need to be said, for the two conceptions recommend dramatically different approaches to jurisdictional determinations. The "individual rights" conception, for example, would dictate that the determinant of jurisdictional limits be simply one of practicability and convenience. Any court or tribunal that believes itself capable of construing international law would be competent to render a judgment, subject only to such prudential concerns as to its workload, the convenience of the litigants and their witnesses, and perhaps the ultimate enforceability of the judgment. By contrast, the state-based rights approach yielded the classical rule by which jurisdiction existed only through the consent of the party in extraterritorial cases, or as a matter of grace by the sovereign the jurisdiction of whose domestic courts was invoked. 248

But the rule of law, the entrance into whose realm jurisdictional issues perform an indispensable filtering function, seeks both to transcend and embrace moral and philosophical abstractions as readily as it does the pragmatic politics of power. Appropriate jurisdictional rules thus reflect the complexities of diverse and indeed divergent moral and philosophical approaches to the issues of "rights" and the very unequal distribution of the power among the articulators and enforcers of those traditions. Regardless of the

246. Proponents of international human rights differ significantly about the sources and content of those rights. See generally Mutua, supra note 145.
248. See supra notes 197-98 and accompanying text.
preferences of individual rights or state-based rights proponents, contemporary jurisdictional norms and practices will have to reflect the shared role of both norms in shaping current international law doctrine. Primarily because individual rights norms are ascendant, and their proponents more assertive in the presentation of their claim for the unlimited extraterritorial jurisdiction of domestic courts, I employ the rationales for that position as foils in the analysis that follows. The object is to explain the seemingly paradoxical position that if domestic courts are to be legitimate participants in the formulation of substantive international law doctrine, they must exercise self-restraint in asserting jurisdiction over international law claims.

Among elites in the West (regardless of whether they hail from the United States, India or Kenya), the assertion that “human rights” are “universal” is now ensconced as an orthodox claim, to which obeisance must be paid even as the analysis that follows the assertion comprehensively undermines the claim. 249 Surely, the violation of rights of persons to be free from torture, to speak freely, and to have a say in their government should not be tolerated on account of alleged cultural differences, any more than the right to be free from arbitrary deprivation of one’s life should depend on such a ground. And what is true about the right not to be tortured applies with equal force to the mutilation of female genitalia, 250 and to the exploitation of children who are forced to work obscene hours in over-crowded and poorly ventilated sweat-shops and brothels.

Confronted with the massive visual and statistical documentation of these inhumanities, is it not churlish for an academic comfortably ensconced in the ivory tower of a Western university to challenge the use of Western courts to correct these wrongs on the mere legal technicality of the excess of jurisdiction? Moreover, isn’t concern over jurisdiction obviated by the fact that the governments in most of the violating societies have signed and ratified numerous international accords that have explicitly outlawed the very practices in question? These are critical questions that must be addressed by any proponent of limits to the assertion of extraterritorial jurisdiction. It requires such proponents—including this

250. See L. Amede Obiora, Campaign Against Female Circumcision, Case W. Res. L. Rev. 275 (1997).
author—to do more than simply assert traditional limits to extraterritoriality, and to explore the social norms that are embedded in the practice of placing national and territorial constraints on the assertion of jurisdiction.

As the early cases in international law demonstrate, jurisdictional limits were essentially political in character. All states were “equal sovereigns,” with complete power over those within their territory. But what did sovereignty mean, and in what way was an Italian city-state an equal sovereign to Russia or Great Britain?

An interesting elaboration on the point, and one that provides a responsive answer with continuing vitality in our contemporary international community, is how this rhetoric of “equal sovereigns” was applied where one “sovereign” was present within the territory of another sovereign. Did “equality” in this instance mean that the latter sovereign could exercise its sovereign authority over the former, or that the former’s sovereignty negated the authority of the latter? The ingenious response fashioned by early international jurists was to confirm the power of the one sovereign to regulate that of the other within the one’s territory, but effectively to deny that power “as a matter of grace.” The lack of jurisdiction reflected not the lack of power, but rather the prudential decision not to exercise the power. What motivated the prudence is, essentially, the explanation of the concept of sovereignty, and the one certainty about it is that it has varied over time, dictated in each instance by a prevailing ideal which, while generally fostered by the intellectual elite of the most powerful members of the international community, transcended the expedient interests of those societies.

In the seventeenth and eighteenth centuries, religious tolerance was the driving impetus for the idea of sovereignty, and for self-restraint in the assertion of power. The nineteenth century was the era of imperial expansion and colonization, and the idea of sovereignty, accordingly, was limited to contact between and among the “civilized states” of Europe and North America. Two brutal wars in the first half of the twentieth century and the norm of “self-determination” reconfigured the idea of sovereignty so that it became a virtually impenetrable shield except where com-

252. Id.
253. Id.
commercial interests were at stake. This last factor itself reflected the third dominant feature of the twentieth century, the divide among states between the capitalist and the socialist mode for structuring the national economy.

It is thus hardly surprising that the emergence of new transcendent intellectual ideologies at this century's end have led to the questioning of the idea of sovereignty, and more particularly, have challenged the justifications previously offered for the concept. Liberal-capitalism, as the dominant ethos of the age, insists on a different conceptualization of sovereignty than did the polarized world that immediately preceded its ascendance. Where the early and mid-twentieth century diplomats and jurists advocated respect for sovereignty as consonant with enlightened views on decolonization, self-determination, political independence and peaceful coexistence in a diverse world prone to cataclysmic warfare, contemporary liberal-capitalist intellectuals find in the idea many of the causes of civil strife, ethnic and gender inequalities, and impediments to both globalization and to the effective enforcement of international human rights. These intellectuals posit an international legal structure dominated by private actors in which "individual rights"—or at least those components of them that are recognized as "first stage international human rights"—can be enforced in any court of law.

Even when one accepts the underlying norms of individual rights exercisable by all without regard to such social cleavages as race, sex, religion, or nationality, the proposition that these rights should be enforced in the domestic courts of any country without regard to the traditional concerns over sovereignty is flawed for numerous reasons, not the least of which are the paradoxes that are embedded in the claim.

The most obvious but telling paradox is that these "individual rights" claims invariably seem to arise from the most contested political conflicts in the Third World. Indeed, a recent survey of the litigation of "international human rights claims" in U.S. courts might easily have substituted as a current affairs topics primer of
the trouble-spots of the non-Western world.\textsuperscript{254} The Second Circuit of the United States Court of Appeals may be correct that under United States law, these “political cases” do not raise nonjusticiable “political questions,”\textsuperscript{255} but the persistent and unilaterally-arrived-at decision by the courts of one nation to sit in judgment over political cases that consistently touch on the raw nerves of the internal conflicts of other societies surely push right up against (if it does not cross) well-tested norms in international law such as those of self-determination.

And here is to be found another paradox. One significant effect of “individual rights” litigation in courts purporting to apply “universal” law may be to deprive the local courts in strife-ridden countries the opportunity to develop and internalize those very same norms. There is no question that the cost of access to West European and North American courts can be quite low. This would especially be the case in the class-action and social causes litigation that are becoming the defining features of human rights litigation in U.S. courts.\textsuperscript{256} Even where such litigation ultimately results in no direct benefit to the individual litigant,\textsuperscript{257} the modest cost it imposes on her, when contrasted with that of local litigation (assuming that the opportunity exists, and in many cases it will not), will assure the channeling of grievances into the former rather than the latter courts.

Yet this individually rational decision presents a classic “fallacy of composition” problem. The losing elites in the political turbulences of the Third World, aided and abetted by the contingent interest groups that invariably emerge in the West—sometimes in response to the pull of social affinities like race, religion, ethnicity and national origin, and other times to the push of ideology or visual journalism—will invoke the well-developed, efficient and potentially remunerative Western judiciary to continue “by other means” the wars lost at home. Meanwhile, their local judiciaries atrophy. Individual rights are ignored in the home country, and the success of the local victors will continue to depend less on the

\textsuperscript{254} Thus, a recent newsletter which chronicled such litigation in U.S. courts listed cases involving Algeria, Bolivia, Bosnia-Herzegovina, Burma (Myanmar), Ethiopia, Guatemala, Haiti, Indonesia, Israel-Palestine, Nicaragua, Nigeria, The Philippines, the City of Los Angeles, and the United States government. See Jennifer Green & Paul L. Hoffman, \textit{Litigation Update: Alien Tort Cases}, INTERNATIONAL CIVIL LIBERTIES REPORT 51-56 (May 1998).

\textsuperscript{255} See Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995).

\textsuperscript{256} See supra notes 52, 55, 120, 123 and accompanying texts.

\textsuperscript{257} See supra notes 131, 138.
judicial fashioning and enforcement of “individual rights” than on the extrajudicial mauling of opponents. Thus, even if one accepts that “human rights” are “universal” and “individual,” the process by which the norm is actualized makes a good deal of difference. The judiciary’s search for individual human rights is not an isolated undertaking. It is part of the same process by which those compromises and absolutes that define and which are integral to “nation-building” (or indeed the constituting of all but the most consanguineous of communities) take place. To deprive turbulent societies of this necessary process under the guise of international humanism is no less imperial — and with about the same likely consequences — as were the European colonial “civilizing missions” of the nineteenth and early twentieth centuries. In both cases, actuated in no small part by a desire to do good, and endowed with the resources to do so, Western institutions propagate an essentialist Polemaic ideology that self-situates their role in providing succor, the consequence of which is that whatever its benefits may be to specific individuals in the short run, its effect is to contribute mightily to deprive the “backward societies” of the opportunity for nurture from within and the internalization of the necessary experiences without which those very cherished Western seeds of “democratic pluralism” and “individual rights” will not flourish.

Aside from rejection of the assertion that the Filartiga-type exercise of extraterritorial jurisdiction constitutes the new legal imperialism, its ultimate defense is that it employs legal instruments to help the weak individual against the autocratic state and its rampaging officials. Since the internal judicial structures of repressive states are incapable of reining in official misconduct, misbehaving officials will go unpunished. This is not an insignificant concern, but whether it should drive judicial action goes to the core of the debate over the proper scope of the judicial function in a democratic environment, and this argument presents the third paradox of the use of domestic courts of advanced industrial societies to compel compliance with international human rights norms in non-Western countries.

First, consider the scope of the claims. As pointed out earlier, the breadth of many of these claims make it difficult to ascertain the boundaries, if any, encompassed within the idea of human rights or “the law of nations.” Interest groups in the United States, for example, purporting to act on behalf of individuals and groups living under such acknowledged repressive regimes as that of Ferdinand Marcos in the Philippines, Sani Abacha in Nigeria,
and Suharto in Indonesia, have not limited their claims to core human rights claims such as torture, arbitrary arrests, unexplained disappearances or even "extrajudicial" killings—as substantial as such claims may be—but have asserted as remediable in U.S. courts alleged economic wrongs such as the uncompensated taking of the property of a local national by that local government, or the unregulated pollution of the local environment as a result of ill-advised policies by those governments. Nor have such actions been limited to miscreant government officials whose future conduct is sought to be deterred. Rather, these *Filartiga*-type actions have been read to embrace conduct by commercial concerns integraly involved in structuring the national economy, as well as by rebel movements in conflicts that are essentially about the internal self-determination and alignment of political power within these countries. In short, such proponents of the "universal jurisdiction" of U.S. courts in human rights cases assert, under the aegis of the ATCA and U.S. law, the imperial right to judicially impose wholesale structural reforms—political, social and economic—on societies whose human rights practices are deemed to be backward. Perhaps the societies would benefit from such changes, but it is surely questionable whether it is within the province of a judicial proceeding to undertake such systemic reconfiguration of a foreign society.

Second, even if one accepts the need for punishment as integral to the promotion of human rights—surely not an unquestionable proposition notwithstanding the emphasis that human rights groups have placed on this goal—it is not the case that civil relief obtained in the domestic courts of a country with no meaningful connection to the place of violation furthers this objective. Aside

258. See *supra* note 29.


261. See Roht-Arriaza, *supra* note 238. The insistence on punishment as a necessary tool in the promotion of international human rights of course has not been limited to the claim for civil remedies in judicial proceedings. Thus, human rights groups have been in the forefront of demands for the imposition of "punitive economic sanctions" on countries whose policies are seen to be in violation of human rights, and for the creation of international tribunals to try persons who engage in human rights violations. The justifications for these latter policies are significantly different from those implicated in the demand for civil relief from domestic courts, so that nothing said in this paragraph—or indeed in this essay—should be read as taking a position on the question of "impunity" generally.
from the fact that the efficacy of the relief is significantly undercut by the inability of the rendering court to enforce it (or for that matter to obtain the assistance of other courts in its enforcement),262 the availability of relief in other spheres, notably the economic, the political and the diplomatic, further undercuts the legitimacy of judicial relief in these circumstances. Whatever may be the particular defects of economic sanctions, diplomatic isolation, or even military occupation as responses to international human rights violations, they are at least subject to the controls and supervision of internal political processes and external engagements.

Because these measures, unlike judicial relief, are "political," they invite open-ended participation by all whose interests are affected, and the validity of the particular measure does not depend on the same sort of procedural concerns that judicial relief elicits.263 The balancing of interests and resort to expedient compromises, all of which may be necessary to obtain any kind of relief or to create a meaningful precedent, are acceptable not because they are necessarily normatively right, but because they reflect the internalization of costs and benefits among the participants. The powerful will doubtless impose burdens on the weak, but one expects that the burden will reflect not simply the sheer capacity of the powerful to enforce their will, but a proportionate discounting of that power by the capacity of the weak, however minuscule, to resist or respond in kind.

When one factors in such other considerations as the non-contemporaneity of the interests that are weighed (that is, power, interests, burdens and benefit are all dynamic and will have different weights over time), it becomes all too clear why civil judicial relief by the courts of a political system far removed from the events that it seeks to regulate is not only a blunt tool, but is entirely inadequate for the task. Legal decisions are products of the political culture and structure within which they are rendered, but that is quite a different matter from asserting that essentially political decisions ought to be legitimated by placing on them the imprimatur of a judicial decision. The promotion of international human rights is likely to suffer rather than be advanced when the transparency of its political roots is clouded by its pseudo-judicialization.

262. See supra note 131.
263. See supra Part IV.
The protests that these comments will doubtless elicit should be moderated by reflection on the divergent experiences of Latin American countries, on the one hand, and of the Republic of South Africa, on the other. Quite remarkably, no human rights claims were brought in United States courts against the Republic of South Africa or its officials, despite the numerous atrocities of the apartheid government. Yet, post-apartheid South Africa has embarked on one of the more innovative efforts at societal reconstruction by imbuing its efforts at reconciling the present and the past with a fair amount of future idealism. In creating a “Truth and Reconciliation Commission” that functions in tandem with the local judicial system, South Africans suggest that discovery of what actually happened may be of equal social value to passing judgment on the wrongdoer; that penitence may be no less integral to the weaving of a durable social fabric than is punishment; and that both individual suffering and individual guilt can be meaningfully faced and made sense of only within a national setting.

The experiment may not work, but it seems not only presumptuous but solely heuristic to suppose that the customary international law doctrines of punishment developed in United States courts and which, under South African law, thus becomes part of their law, should foreclose the capacity of South Africa to innovate in this area. Yet, that is precisely the message that is sent by acceptance of the Filartiga Proposition, unless one takes the position that South African courts are free to cherry-pick from among

264. But see Martin v. Republic of South Africa, 836 F.2d 91 (2d Cir. 1988) (seeking recovery of damages for an American citizen for injuries sustained as a result of poor medical treatment while he was in South Africa). Although racial bias was alleged to be a motivating factor, there was no claim of a violation of international human rights. This is another illustration of the fortuity of U.S. law. At least three reasons may explain this fact. First, there simply may have been no adequate South African defendant who could be served with “notice” in the United States, thereby establishing the required “personal jurisdiction.” Cf. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995). Second, the South African torture machine may have been so effective and complete that there was no tenable plaintiff in the U.S. who could identify her torturer with sufficient specificity to permit the pleading of a Filartiga-type claim. Third, interest groups in the U.S. opposed to the South African regime, assured as they were of the political support of much of the political establishment in the United States, focused on the more practical means of “economic sanctions” as a means of inducing change in that country, rather than on the publicity-gathering but ultimately ineffective tool of human rights litigation. Fourth, the explanation may simply lie in the vicissitude of timing. The emerging law of international human rights in U.S. courts may not have developed sufficiently by 1990 when the end to apartheid became manifest and irreversible.

265. See supra note 195.
the various customary international law rules, a position that is at a minimum paradoxically at odds with the concept of the rule of law.

In contrast to the lack of South African subjection to human rights litigation in U.S. courts, many officials of repressive Latin American governments were sued under the *Filartiga* Proposition. But like South Africa, many of these South and Central American societies have in recent years witnessed substantial political reforms that swept out the repressive governments. Yet, it is fair to say that none of the Latin American countries have undertaken the sort of thoroughgoing internal judicial efforts to resolve the socio-political conflicts of the past through judicially imposed accountability on their past wrongdoers. While tentative steps appear to be in progress in Chile and Argentina, countries like Paraguay and Haiti do not appear to be any more likely to resort to the judicial process today than they were in 1980 or 1990. More than that, with the exception of the quite unusual case of Siderman de Blake, there is no evidence that litigation in U.S. courts has contributed in any way to providing monetary relief to the individual plaintiffs, or social relief to their societies at large. Indeed, as an English jurist recently pointed out in the *Pinochet* case, the consequence of Western adjudication of these cases may well be to frustrate efforts at the internal resolution of those societies' problems.


267. *See supra* note 29. Notably, the case was settled by a subsequent "democratically elected" Argentinian government which had no responsibility for the alleged wrongful conduct of the prior military regime.

268. *See Ex parte Pinochet* (H.L. 1998) (Lord Lloyd of Burwick) (advancing as support for declining jurisdiction that the Chilean legal and political systems have been engaged over the last ten years in a "delicate" series of compromises to address the human rights issues at the core of Spain's request for Pinochet's extradition; namely, that Pinochet's abdication of power in 1990 and the subsequent holding of democratic elections was conditioned on political and judicial arrangements including the grant of immunity to him under Chilean law, that the Chilean Supreme Court in at least five cases had construed the scope of that immunity, that there were pending in Chilean courts at the time of the Spanish extradition request eleven suits against Senator Pinochet, and that the Chilean government as well as a significant proportion of the Chilean population believed the internal resolution of these issues essential to the well-being of the Chilean polity and society).
The point of particular importance in both South Africa and the Latin American countries is not whether they successfully punish wrongdoers. Although fashionable, it is a mistake to equate "justice" with "punishment." What is important is that the experience of trying to come to grips with the interplay of criminality and politics within the particular society is one that shapes the structures and institutions of that society, not the least of which are the judiciary and related institutions.\footnote{269 In this context, Chilean reaction to the arrest in the United Kingdom of the former Chilean head-of-state, Gen. Augusto Pinochet, following an extradition request from Spain is noteworthy. In an opinion piece in the Washington Post, Chile's ambassador to the United States, representing a government that cannot be accused of systematic human rights violations, pointedly rejected the arrogation to themselves by the United Kingdom and Spain of the right to punish General Pinochet for acts that he took while the President of Chile. \textit{See} Genaro Arriagada, \textit{Beyond Justice}, WASH. POST, Oct. 25, 1998, at C7. \textit{See also} Tim Golden, \textit{Arresting an Ex-Dictator is One Thing, Then it Gets Tough}, N.Y. TIMES, Oct. 25, 1998, at A5. The potential farce to which otherwise legitimate human rights concerns can be subjected has been illuminated in this case by French and Swiss demands for the extradition of Pinochet to Switzerland and France, and by Chile's threat to seek the extradition of Queen Elizabeth II should she travel outside of the United Kingdom on the ground that she is responsible for the death of Chilean bystanders during Britain's war with Argentina in the Falklands.} Whether South Africa's Truth and Reconciliation Commission works or fails, the one certainty is that South Africans will learn from it, and cannot shift the responsibility for its failure (or for that matter allot the credit for its success) to others.\footnote{270 It is noteworthy that strife-ridden societies with massive instances of human rights violations such as Cambodia have tended to look toward the South African experiment as a source of inspiration rather than the self-righteously punitive dictates being insisted on in the West. Of course, since the pay-master will always call the tune, the prospects for a repetition of the South African experiment do not look promising. That, ultimately, will be a pity.} Similarly, but of no small consequence, Westerners will not always saddle themselves with the guilt of failure, or, as is more likely the case, invariably take credit for the "new South Africa," effectively minimizing the role of the local population in its self-actualization.\footnote{271 This is not to suggest, of course, that the development of human rights norms and practices in South Africa (or any other country) is the sole concern of the individual country. The international community exercises significant influence through intellectual exchanges, including the borrowing of judicial precedents. Moreover, the exploration in this essay and the comments here address the unilateral imposition of the judicial processes and laws of one country on countries and persons having nothing to do with that country. Treaty arrangements—bilateral as well as multilateral—can of course reorder such a situation.}

One other consideration is worth articulating explicitly. Proponents of the use of domestic courts to enforce international human
rights as a universal prerogative generally have in mind judicial systems that function more or less autonomously of the political branches of their national governments. But it is unclear why, if the principle is established, it must be limited to such courts. Why should non-totalitarian or autocratic states invoke the power of their courts to remedy what they consider to be international human rights violations, even if such rights apply to the so-called "third generation rights," such as economic exploitation, cultural despoliation, or "ethnic discrimination?" Given the fluidity of the processes for ascertaining the existence of such "rights" in international law,\textsuperscript{272} it is hardly sufficient to argue that such determinations would be unlawful simply because one disagrees with the substantive content of the right. We will thus have to explain why the processes employed by the court either to ascertain the right, or to enforce it, are unacceptable. Yet, it is precisely these processes that, in the haste to bring wrongdoers to book, current Western proponents of the use of domestic courts to enforce international human rights norms seem either unwilling or incapable of inquiring into.

As appealing as it may thus appear at first blush, the arrogation by a municipal court of the unbridled power to punish wrongdoing under the guise of enforcing international law should be resisted not only on account of its effectiveness, but more fundamentally because of what it says about the social distribution of power within the international community. Regrettably, the use of the maltreatment of individuals in nonwestern societies as the justification for the wholesale subjugation of the culture, politics and economics of those societies is not a fanciful nightmare. That is much of the history of the European colonization process prior to World War I. The barbarities which European civilizing missions sought to correct, whether in West Africa, the Sudan, the Congo or China, were real enough. Yet, virtually none of those societies would happily have opted for the next sixty years of their existence. Of course, none of the proponents of the current push in Western courts to civilize the dictators-cum-leaders of Third World societies see the movement as the heir to Gordon Kitchener’s expeditionary mission, but that’s largely because, as demonstrated in Part III above, their focus is on the narrow interest group politics of legal change within their own domestic systems. Just as colonial outposts were incidental objects of metropolitan

\textsuperscript{272} See supra note 34.
politics in late nineteenth and early twentieth centuries’ European politics, so also is the fixation today on the undoubted atrocities taking place in some developing societies. Consider, for example, how much knowledge of these developing societies is possessed by those who, at the drop of a hat, are only too willing to brandish summons and complaints of human rights violations in those societies? Is the television camera any less superficial as a recorder of history than the yellow rags of the late nineteenth century?

VII. CONCLUSION

The means by which laws are enforced are not unrelated to the content of those laws. As long as the human rights ills of the world, regardless of their origins and their impact, are thought capable of resolution in the courts of the United States (or for that matter, any other country) on the sole criterion of resource endowment, the debates over whether rights are “universal” or not, whether rights are best created “top-down” or “bottom-up”, will be entirely chimerical, and a pointless academic debate. Laws differ from moral and ethical norms because compliance with them can be enforced. The legitimation of the external compulsion that is entailed in the enforcement of any law derives in no small part from the restraint that is placed on the enforcement mechanism. That is the role of jurisdictional doctrine.

In relying solely on jurisdictional limits placed by domestic law while purporting to construe international human rights law, domestic courts undercut the legitimacy of their undertakings. Self-restraint in taking on cases should be seen as a greater virtue than the self-congratulation of functionally ineffective high-minded pronouncements on international human rights norms. If the international community of jurists is to create an enduring jurisprudence of international human rights law, it will be because those norms converge from adjudications in multiple jurisdictions each reflecting the socio-political structures of its constitution, while seeking to conform local practices to evolving international standards. The resolution of the conflicts that will often be generated by this process will sometimes be expedient, sometimes principled. Unfortunately, when domestic courts insist that “all disputes must be resolved under our laws and in our courts,” they do not only evince morally deplorable parochialism, but consequentially, they

retard the cross-cultural convergence and internalization of the very human rights norms that they assert as uniformly applicable to the global community.